Supreme Court, U.S.
FILED

No. ____

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IN THE

Supreme Court of the United States

HIGH COUNTRY CITIZENS' ALLIANCE; TOWN OF CRESTED BUTTE, COLORADO; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO,

Petitioners

v.

THE DIRECTOR OF THE UNITED STATES BUREAU OF LAND MANAGEMENT, *ET AL.*,

Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

TIM ATKESON
Counsel of Record
ARNOLD & PORTER LLP
370 Seventeenth Street, Ste. 4500
Denver, CO 80202
(303) 863-1000

QUESTIONS PRESENTED

Whether Congress would have precluded judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, of a denial by the Bureau of Land Management of a protest to a patent application pursuant to the General Mining Law of 1872, 30 U.S.C. § 21 *et seq.*, where the mining law specifically allows third parties to participate before the agency and to object to unlawful private appropriations of federal land.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the United States Bureau of Land Management ("BLM"), the BLM Colorado State Director, the Secretary of the Interior, the United States Department of the Interior, Phelps Dodge Corporation, and Mt. Emmons Mining Company are respondents in this case.

In the court of appeals, "U.S. Energy Corp." and "Crested Corp." filed a joint motion asserting that they had acquired the patented mining claims previously held by respondents Phelps Dodge Corporation and Mt. Emmons Mining Company and seeking to be substituted in the action pursuant to Fed. R. App. P. 43(b). The court of appeals did not rule on the motion; thus, the parties have not yet been substituted.

Neither the Town of Crested Butte, Colorado nor the Board of County Commissioners of the County of Gunnison, Colorado is a nongovernmental corporation. High Country Citizens' Alliance is a non-profit corporation and is not publicly owned.

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PETITION FOR WRIT OF CERTIORARI

High Country Citizens' Alliance, the Town of Crested Butte, Colorado, and the Board of County Commissioners of the County of Gunnison, Colorado respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-43a) is reported at 454 F.3d 1177. The opinion of the court of appeals denying panel rehearing and rehearing en banc (App. C, *infra*, 61a-62a) is unreported. The opinion of the district court (App. B, *infra*, 44a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2006 (App. A, *infra*, 1a). A petition for rehearing was denied on October 27, 2006 (App. C, *infra*, 61a). On January 5, 2007, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Administrative Procedure Act provides, in relevant part:

> § 701. Application; definitions
>
> (a) This chapter applies, according to the provisions thereof, except to the extent that--
>
> (1) statutes preclude judicial review . . . .

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §§ 701–02.

The General Mining Law of 1872 provides, in relevant part:

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim . . . , having claimed and located a piece of land for such purposes, . . . may file in the proper land office an application for a patent . . . . The register of the land office . . . shall publish a notice that such application has been made, for the period of sixty days . . . . If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43.

30 U.S.C. § 29.

Department of the Interior regulations pertaining to 30 U.S.C. § 29 state, in relevant part:

At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant

> has failed to comply with the law in any matter essential to a valid entry under the patent proceedings.

43 C.F.R. § 3872.1.

STATEMENT

1. a. Under its Property Clause power, Congress has enacted various statutes governing the locating and mining of minerals on federal public lands. One such statute, the General Mining Law of 1872 (the "1872 Mining Law"), 30 U.S.C. § 21 *et seq.*, provides that citizens may file mining claims on lands owned by the United States upon locating "valuable mineral deposits" on those lands. *Id.* § 22. Thereafter, only the holder of the mining claim may extract the minerals contained within the area of the mining claim. "A mining claim confers the right to exclusive possession of the claim, including the right to extract all minerals from the claim without paying royalties to the United States." *Collord v. U.S. Dep't of Interior*, 154 F.3d 933, 934 (9th Cir. 1998); *see also* 30 U.S.C. § 26 ("The locators of all mining [claims] ... shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth ....").

The 1872 Mining Law further allows the owner of a mining claim to obtain a "patent" (fee title) to the surface land above the mining claim, upon compliance with certain conditions. *See* 30 U.S.C. § 29. To get a patent, the mining claim locator must submit an application to the Bureau of Land Management ("BLM"), the agency within the Department of the Interior that is charged with administering the 1872 Mining Law. The patent applicant has the burden of demonstrating, *inter alia*, that the mining claim on which the patent is sought contains "valuable mineral deposits" "within the limits of the claim." *See* 30 U.S.C. §§ 22-23.

The inherent value of any minerals in a deposit does not alone make it a "valuable mineral deposit"—the claimant must also satisfy the Department of the Interior's "marketability" test. *See United States v. Coleman*, 390 U.S. 599, 600 (1968) ("[T]o qualify as 'valuable mineral deposits' under 30 U.S.C. § 22 it must be shown that the mineral can be 'extracted, removed and marketed at a profit'—the so-called 'marketability test.'"). As the Department of the Interior has stated, a patent applicant must also "show that a profit can be made after accounting for the costs of compliance with all applicable laws . . . ." *Great Basin Mine Watch et al.*, 146 I.B.L.A. 248, 256 (1998). Thus, to be awarded a patent, an applicant must demonstrate that removal of the minerals will be profitable even after taking into consideration the costs of extraction, removal, transportation, marketing, and compliance with applicable federal, state, and local regulations. If the applicant can satisfy this marketability test, and if the applicant complies with the other requirements for a patent, then the applicant may purchase fee title to the land from the United States at the below-market statutory rate of $5.00 per acre, thereby removing the land from the public trust.

b. In response to a patent application, the 1872 Mining Law allows members of the public to file "protests" with the BLM asserting that the patent applicant has failed to comply with the law and is thus not entitled to the patent.[1] *See* 30 U.S.C. § 29. The BLM must then evaluate the grounds on which protest is made and decide whether to grant or deny the protest. *See Swanson v. Babbitt*, 3 F.3d 1348, 1353 (9th Cir. 1993) ("The Secretary of the Interior

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[1] Parties who assert competing ownership claims to the land on which the patent is sought may also file "adverse claims" with the BLM. *See* 30 U.S.C. § 30.

has a responsibility to ensure patent applications comply with existing law.").

2. In 1977, AMAX Exploration, Inc. ("AMAX") filed ten lode mining claims on approximately 174 acres of public land located within the Gunnison National Forest in Gunnison County, Colorado. Although sometime between 1977 and 1980 AMAX submitted a plan of operations to construct and operate an underground mine for the mineral molybdenum, it withdrew the mining proposal when the price of molybdenum began to drop sharply in the early 1980's. The mining claims were thus never developed, and no actual mining was ever done on the claims.

In December 1992, with molybdenum prices at a 17-year low, AMAX's successor, respondent Mt. Emmons Mining Company ("MEMCO"), submitted a patent application to the BLM seeking to obtain fee title to the land on which the ten mining claims were located. The application asserted that AMAX/MEMCO had discovered "valuable" deposits of molybdenum within the area of each of the ten mining claims and therefore requested that the BLM sell all 174 acres to MEMCO for $5.00 per acre—a total of $870.

Petitioners—the Gunnison County Board of County Commissioners, the nearby town of Crested Butte, and High Country Citizens' Alliance, a nonprofit conservation group comprised of local citizens—each filed protests in early 1993 with the BLM objecting to MEMCO's patent application. The protests asserted that the patent should not be granted because MEMCO could not satisfy the marketability test for at least two reasons. First, in a related case, MEMCO had conceded that it is an "undisputed fact that development of a molybdenum mine at Mt. Emmons is not feasible due to a chronic and world-wide oversupply of molybdenum that has persisted since the early 1980s." C.A. App. at 76. Second, petitioners presented evidence that extraction of the molybdenum would not be economic given the costs MEMCO would necessarily incur in

complying with the local Watershed Protection District Ordinance, *see* Crested Butte, Colo., Code art. 14, § 5 (1987). Petitioners were concerned with preventing the wrongful removal of the land in question from the public trust because use of th land was critical to their recreational and tourism needs and because development of the land would have a detrimental effect on the Town and County's watershed.

In September 2000, the federal government completed a "Mineral Report" that discussed MEMCO's mining claims. On April 28, 2000 and August 17, 2001, petitioners filed Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requests for "all documents" related to MEMCO's patent application. Nonetheless, the BLM refused to release to petitioners portions of the Mineral Report and attachments to that report.

On April 2, 2004, the BLM Director dismissed petitioners' administrative protests to the granting of the patent. As a justification for its decision, the BLM Director cited (but did not reproduce) portions of the Mineral Report that the agency had refused to turn over to petitioners and that petitioners had no opportunity to review or rebut. That same day, without any prior notice to petitioners, the BLM Director approved MEMCO's patent application as to nine of the ten lode mining claims, comprising a total of 155 acres of public land. Petitioners had no opportunity to respond to the dismissal of their protests prior to the issuance of the patent to MEMCO. With the grant of the patent, the previously public land was privatized and the public excluded.

3. Petitioners brought an action in federal district court against respondents: the United States Department of the Interior, the Secretary of the Interior, the BLM, the BLM Director, the Colorado State BLM Director, MEMCO, and MEMCO's parent company, Phelps Dodge Corporation. Petitioners' complaint asserted (1) that the dismissal of petitioners' protests and the granting of the patent violated

the 1872 Mining Law, its implementing regulations, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, (2) that the federal defendants had improperly withheld records requested by petitioners, in violation of FOIA, and (3) that respondents violated the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, and the APA by failing both to "structure adjudication procedures to assure adequate third party participation," 43 U.S.C. § 1701(a)(5), and give "prompt notice" of the denial of petitioners' protests "accompanied by a brief statement of the grounds for denial." 5 U.S.C. § 555(e). Petitioners sought declaratory and injunctive relief, including an injunction rescinding both the issuance of the patent and the conveyance of the subject land to MEMCO.

In an order filed January 12, 2005, the district court granted motions to dismiss petitioners' APA and FLPMA claims.[2] *See* App. B, *infra*, at 44a. The district court held, in pertinent part, that parties who do not claim an ownership interest in land cannot use the APA to challenge the issuance or validity of land patents granted under the 1872 Mining Law in federal court.

4. a. Petitioners timely appealed the dismissal of their APA claims to the United States Court of Appeals for the Tenth Circuit.[3] On July 21, 2006, a divided panel of that court affirmed the dismissal. Although the majority recognized that "[a] presumption of reviewability accompanies agency actions under the APA," App. A, *infra*, at 5a-6a, it held that the presumption was overcome as to protests under the 1872 Mining Act and that even

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[2] Petitioners' FOIA claim against the federal defendants was subsequently decided by the district court and is not at issue here.

[3] Petitioners did not appeal the dismissal of their FLPMA claim.

though Congress had created a mechanism for third parties to protest patent applications, it must have intended that there be no judicial review available to those patent protesters.

Drawing from this Court's decision in *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984), the majority looked at several factors in evaluating whether Congress had intended that the presumption of reviewability be overcome. First, the majority looked to legislative history. Unable to find much on the 1872 Mining Law, the majority focused on selected comments regarding security and finality of title made by Congressmen during debates on two earlier laws, the Lode Law of 1866 and the Placer Act of 1870, neither of which allowed for administrative protests. App. A, *infra*, at 15a.

Second, the majority looked to judicial constructions of the 1872 Mining Law. Admitting that it was "unable to find . . . a case directly on point," *id.* at 19a, the majority instead examined "instructive" non-APA cases and cases that did not involve the 1872 Mining Law, *see id.* at 18a-20a & n.12, concluding that "the courts' resolution of [issues related to patents in those cases] is indicative of an emphasis on finality." *Id.* at 18a.

Finally, the majority concluded that despite the public interest "in making sure patents conform to law," *id.*, and despite Congress' creation of a mechanism for third party protests, "[t]he limited role that the protesters play in the statutory scheme, coupled with congressional interest in finality and security of title, persuade us that the statutory scheme as a whole suggests an intent to preclude review." *Id.* at 27a. The majority therefore affirmed the dismissal of petitioners' claims.

b. In dissent, Judge Briscoe disagreed with each aspect of the majority's preclusion analysis. In addition, she noted that the majority had "incorrectly describe[d] the burden of proof" by "fail[ing] to charge the agency with the burden to . . . demonstrate 'nonreviewability,'

which is the 'exception' because 'judicial review of such administrative action is the rule.'" *Id.* at 32a (Briscoe, J., dissenting) (quoting *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970)). Moreover, Judge Briscoe pointed out that the majority's perception that Congress' "paramount" interests in enacting the 1872 Mining Law were finality of title and the lessening of litigation conflicts with the text and structure of the statute. In fact, the 1872 Mining Law "unquestionably *increased* litigation over the issuance of a patent by granting adverse claimants a cause of action and allowing third parties to participate in the administrative proceeding." *Id.* at 36a (Briscoe, J., dissenting).

Judge Briscoe concluded that "[b]ecause the [1872] Mining Law allows protesters to participate in the administrative process, Congress did not intend to preclude judicial review of protesters as a class." *Id.* at 42a (Briscoe, J., dissenting).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case holds that the BLM may grant a private party fee title to public land in violation of the statutory scheme, allowing any use of the land,[4] without the possibility of judicial review. Land that has in the past been publicly usable and accessible is thereafter subject to whatever restrictions the new owner sees fit to impose. *See, e.g.*, Gunnison Country Times, Apr. 8, 2004 (MEMCO's assertion in a local newspaper that it "do[es]n't allow public access on [other MEMCO private land]" and that "[t]he same situation would apply

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[4] *See* 140 Cong. Rec. H9108-01, H9110 (daily ed. Sep. 13, 1994) (statement of Rep. Rahall) ("[O]nce the mining claim is patented, nothing in this so-called mining law says that it has to be actually mined. The land is now in private ownership. People are free to build condos or ski-slopes on the land.")

on the newly patented lands"). Moreover, this ruling affects a vast amount of land. The federal government administers over 400 million acres of public land that is open to location of mining claims, *see* George Cameron Coggins *et al.*, *Federal Public Land and Resources Law* 590 (5th ed. 2002), and 4.4 million of those acres are already covered by patentable mining claims, *see* Bureau of Land Management, *2007 Budget Justifications*, at III-320, *available at* http://www.blm.gov/budget/2007just/2007mlr1600_4550rollup.pdf.[5]

The court of appeals mistakenly concluded that even though Congress allowed third parties who assert no ownership interest in land to protest land patent applications, *see* 30 U.S.C. § 29, Congress *intended* that there be no judicial check on the BLM's unlawful transfer of public land to private ownership under the 1872 Mining Law. That holding both misreads Congress's intent and conflicts with this Court's recognition of the importance of protecting the public's right to public lands and preventing unauthorized privatization.

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[5] Since 1990, members of Congress have proposed a temporary moratorium on the filing of new patent applications. *See* 139 Cong. Rec. H9739-02, H9756 (daily ed. Nov. 16, 1993) (statement of Rep. Regula). A one-year moratorium was enacted in 1994. *See* Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, § 112, 108 Stat. 2499, 2519 (1994). Although similar moratoria have been enacted each subsequent year, without yearly affirmative action by Congress the moratorium will lapse and new patent applications could be filed. It is worth noting that there have been recent efforts to end the moratorium, which, if successful, would reopen these public lands to patent applications. *See, e.g.*, H.R. 4241, 109th Cong. § 6202, H.R. Rep. No. 109-276, at 1338-40 (2005).

The court of appeals' holding fails to properly apply the "clear and convincing" standard that must be met before a court may conclude that Congress intended to preclude judicial review. There is a strong presumption that all executive agency action is subject to judicial review. The court of appeals majority essentially ignored this presumption and resolved all ambiguities in favor of no review.

I. The Court of Appeals Wrongly Concluded That Even Though Congress Created a Mechanism for Third Parties to Protest a Patent Application for Failing to Comply with the 1872 Mining Law, Congress Intended There Be No Judicial Check on the BLM's Ability to Unlawfully Privatize Public Land Through the Land Patent Process.

A. The Court of Appeals Misconstrued Congress' Interest in Finality as Evidence of an Intent to Preclude Judicial Review.

After reviewing both the legislative history and the judicial construction of the 1872 Mining Law, the Tenth Circuit majority asserted that "security [and finality] of title [were] integral to and paramount in the passage of the mining laws." App. A, *infra*, at 9a. It concluded that the expression of these interests was clear and convincing evidence Congress intended them to trump any judicial review of third-party protests that might be necessary to protect the public's interest against unlawful private appropriation of public land. The majority erred in at least two ways in reaching this conclusion.

1. The Court of Appeals Relied on Legislative History and Judicial Constructions That Were Not on Point.

First, neither the legislative history nor the judicial constructions relied on by the majority explicitly addressed whether judicial review of the denial of third-party protests

should be available. With regard to the legislative history, the majority drew heavily from selected statements of Congressmen discussing mining laws that preceded the 1872 Mining Law and had no provision for third-party participation in agency proceedings. The majority could find no discussion in the legislative history as to what Congress intended to accomplish in creating the protest mechanism in the 1872 Mining Law. This failure is telling in light of this Court's recognition in 1920 that, in his review of patent applications, Congress charged the Secretary of the Interior with, among other things, preserving the rights of the public and preventing "an unlawful private appropriation in derogation" of those rights. *Cameron v. United States*, 252 US. 450, 460 (1920). There is certainly nothing in the legislative history that indicates Congress intended "unlawful private appropriations" to be final and unreviewable.

With regard to the judicial constructions the majority relied on, it conceded that it was "unable to find . . . a case directly on point." App. A, *infra*, at 19a. That alone suggests the absence of the requisite "clear and convincing" evidence.[6] Moreover, the cases that the majority found to be "analogous" and "instructive" did not involve a challenge to the federal government's alleged unlawful privatization of public lands. Each of the cited "contemporaneous" cases—*Smelting Co. v. Kemp*, 104 U.S. 636 (1881), *Steel v. St. Louis Smelting & Ref. Co.*, 106 U.S. 447 (1882), *Wight v. Dubois*, 21 F. 693 (C.C.D. Colo. 1884), *Sparks v. Pierce*, 115 U.S. 408 (1885), and *Iron*

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[6] The majority's reliance on judicial construction is questionable for an additional reason. The majority did not find that Congress had acquiesced in the contemporaneous judicial decisions. App. A, *infra*, at 25a. Without that acquiescence, the judicial decisions it cited are hardly clear and convincing evidence of Congress's intent.

Silver Mining Co. v. Campbell, 135 U.S. 286 (1890)—were lawsuits brought by private parties against other private parties. The courts' determinations that the private parties could not collaterally attack the patents issued by the federal government thus has no bearing on whether parties can directly seek review of unlawful agency decisions. The majority's explanation that the cases are relevant because they are "indicative of an emphasis on finality" rings hollow, since the cases only decided finality as to other private individuals, not lawsuits brought against the federal government to determine whether its actions complied with the law.

Here, petitioners are not seeking to challenge a private individual's claim to a title; they are contesting the BLM's action in dismissing their patent protests as arbitrary and capricious under the APA. Certainly, upon judicial review of that question, a decision on the merits would affect the private respondents' claim to title if it were shown that they did not meet the standards set out in federal law. However, that does not make petitioners' claims a collateral attack on the patent. In fact, the only reason the patent is at issue at all is that the BLM immediately granted the patent before petitioners had a chance to respond to the denial of their protests. By concluding that the issuance of the patent precluded judicial review, the court of appeals allowed the agency itself to foreclose judicial review of its own illegal decision.

2. The Court of Appeals Misread the Legislative History and Judicial Constructions It Relied On.

Second, the court of appeals erred in concluding that Congress intended its interests in finality and security of title, assuming those interests extended to the granting of

patents,[7] to be absolute. Nothing in the legislative history or judicial constructions relied on by the majority indicated that Congress was mandating that all BLM patent decisions would be non-reviewable. Instead, there has never been a question that Congress expected there would be judicial review of denials of patent applications, *see, e.g.*, *Or. Basin Oil & Gas Co. v. Work*, 6 F.2d 676 (D.C. Cir. 1925), *aff'd* 273 U.S. 660 (1927); *Adams v. Witmer*, 271 F.2d 29, 34 (9th Cir. 1959) (BLM decisions to deny patent applications "have in fact been reviewed by the courts for many years and long before the Administrative Procedure Act came into existence"), and decisions to rescind a patent, *see*

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[7] There is certainly a question as to whether the granting of a patent is critical to the development of a mine. A mere dozen years after the passage of the 1872 Mining Law, this Court held:

> Though by appropriate proceedings and the payment of a very small sum a legal title in the form of a patent may be obtained for such mines, the possession under a claim established according to the law is fully recognized by the acts of congress, and *the patent adds little to the security of the party* in continuous possession of a mine he has discovered or bought.

Chambers v. Harrington, 111 U.S. 350, 352-53 (1884) (emphasis added); *see also Wilbur v. U.S. ex rel. Krushnic*, 280 U.S. 306, 316-17 (1929) (stating that "innumerable decisions of this Court" establish that "when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of . . . [a] possessory right [which], for all practical purposes of ownership, is as good as though secured by patent"). Similarly, the existence over the last twelve years of the annual moratorium, which only prevents the filing of new patent applications but does not affect the location and development of mining claims, raises the same question.

United States v. Iron Silver Mining Co., 128 U.S. 673 (1888) (suit by the United States to cancel a patent). The fact that Congress in 1872 did not anticipate judicial review of agency action under the APA is neither surprising nor determinative. By creating the third-party protest mechanism, Congress clearly evinced an interest in preventing the unlawful granting of patents. Given the presumption of judicial review that exists today, there is no clear and convincing evidence that Congress would have elected to make the protests non-reviewable had the APA been enacted then.

B. The Court of Appeals Mistakenly Concluded That the Statutory Scheme Evinces an Intent to Preclude Review.

The Tenth Circuit majority concluded that "[t]he statutory scheme of the 1872 Mining Law is indicative of Congress' intent to preclude review to those with no adverse claim in the patented land." App. A, *infra*, at 25a. This conclusion is erroneous for several reasons.

First, the majority's reliance on the fact that the 1872 Mining Law explicitly granted adverse claimants a right of action but did not make a similar provision for third-party protestors is misplaced. The right of action for adverse claimants is to sue each other, not the BLM, *see* 30 U.S.C. § 30, so it was not the case that Congress allowed one class of persons a right to judicial review but not another.[8]

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[8] Moreover, even if adverse claimants could seek judicial review of unfavorable BLM decisions, this would not provide a sufficient check on unlawful privatization. *See* App. A, *infra*, at 23a-24a. The issue to be resolved between adverse claimants is who has the better claim; it is not whether either claim is valid. Only with judicial review of a third-party protest can there be a determination that the agency's actions in conveying title are lawful.

Second, the majority ignored the fact that unlike Congress' enactments in previous mining laws, it specifically created a mechanism in the 1872 Mining Law for third parties to protest before the agency, and it did so at a time when the government had not waived its sovereign immunity and the protesters would not have had standing to file suit in federal court. *See* App. A, *infra*, at 41a (Briscoe, dissenting). Finally, the fact that Congress specifically granted a stay of administrative patent proceedings while an adverse claimant brings a court action is hardly evidence—let alone "clear and convincing" evidence—of an intent to *prevent* parties who do not claim an adverse interest from obtaining judicial review of the denial of their protests once the government waived its immunity from lawsuits under the APA.

Additionally, the majority found it significant that "[n]either the statute, nor the BLM regulations provide [a] protestant with rights of appeal," implying that if they are not allowed to appeal the denial of protests, they should be precluded from judicial review. App. A, *infra*, at 26a. However, the majority's statement ignores the fact that the BLM regularly entertains appeals from protesters. *See Am. Colloid Co. v. Hodel*, 701 F. Supp. 1537, 1540 (D. Wyo. 1988) ("Burnham filed a protest ... asserting that American Colloid had not complied with all the legal requirements for obtaining a patent. The BLM ... dismiss[ed] the protest. ... Burnham appealed the dismissal to the IBLA[,] ... [which] reversed ...."); *see also, e.g.*, *Wilderness Soc'y Great Bear Foundation*, 151 I.B.L.A. 346 (2000) (appeal from the BLM's dismissal of a patent protest); *Agri Beef Co.*, 148 I.B.L.A. 52 (1999) (reversing the denial of a patent application protest); *Scott Burnham*, 100 I.B.L.A. 94, 119-21 (1987) (concluding that "ownership of adjoining land or *past usage of the land in dispute*" gives a party sufficient interest for standing to appeal a protest dismissal). Protesters can and do appeal the denial of their protests.

Rather than evincing an intent to *limit* third-party participation, the statutory scheme of the 1872 Mining Law is significant in that it explicitly opens the administrative process to participation by third parties. Unlike the situation in *Block*, where there was no "provision for participation by consumers in any proceeding," 467 U.S. at 347, "Congress relied upon third parties to ensure that patent applications complied with the statute by filing protests with the agency." App. A, *infra*, at 42a (Briscoe, J., dissenting). That Congress did not also go further and establish a right of action for third parties is surely not evidence of an intent to prohibit such review. *Cf. id.* at 28a n.17 ("[H]ad Congress intended to expand the scope of protester involvement beyond the agency stage, it certainly could have done so."). The majority got it backwards—the presumption under the APA is that judicial review *is* available. That Congress did not explicitly provide for such review in the 1872 Mining Law is immaterial.

C. The Court of Appeals Ignored the Strong Presumption of Judicial Review and Misread the Precedents of This Court.

In concluding that Congress intended to preclude review of the BLM's denial of third-party protests, the Tenth Circuit majority ignored the strong presumption in favor of judicial review. The majority implied that the 1984 *Block* decision has weakened the strength of the presumption, *see* App. A, *infra*, at 7a, but that conflicts with this Court's decisions both before and after *Block*. This Court has consistently explained that an agency whose action is challenged bears "the *heavy* burden of overcoming the *strong* presumption that Congress did not mean to prohibit all judicial review." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (emphases added); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 672 (1986) (quoting—two years after the *Block* decision—the above statement from *Dunlop*).

Similarly, this Court has reaffirmed since *Block* that the "clear and convincing evidence" standard—originally used in *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)—must be satisfied to overcome the presumption of judicial review. *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) (holding that the presumption was unrebutted because "[t]here is no such clear and convincing evidence in the statute before us"). Thus, under this Court's precedents an agency has the burden of rebutting the strong presumption in favor of judicial review, and it must do so with the use of "clear and convincing evidence." The court of appeals did not require the BLM to meet this burden and, by failing to do so, it misread those precedents.

D. The Court of Appeals' Fear of Too Much Review Was Inappropriate.

The Tenth Circuit majority appeared to have an underlying concern with the potential number of lawsuits that could be brought if judicial review were not precluded for third parties. It apparently was motivated, at least in part, by a desire to limit the universe of potential claimants. *See* App. A, *infra*, at 21a (referring to "a potentially unlimited number of third-parties without [competing property] rights seeking to invalidate the property rights of others").

This concern for the size of the universe of potential claimants, however, is present in every *Block* case. Whether Congress intended to preclude judicial review for certain classes of affected persons is directly tied to how broad the universe of potential litigants is. In the absence of "clear and convincing evidence" of congressional concern, it is inappropriate for a court to separately withhold judicial review because of the number of persons who may have access to it—especially because the presumption is in favor of judicial review.

Moreover, in addition to both constitutional and prudential standing requirements, there is an obvious limit in this case as to who may obtain judicial review. Any party who tried to challenge the BLM's denial of a patent protest in court and who had not participated before the agency would likely be unable to satisfy the requirement that administrative remedies be exhausted. Not only was the majority's concern improper, but it was also unfounded.

CONCLUSION

For the reasons stated above, Petitioners ask that this Court grant their petition for a writ of certiorari to review the order of the Tenth Circuit court of appeals in this matter.

Respectfully Submitted,

TIM ATKESON
Counsel of Record
ARNOLD & PORTER LLP
370 Seventeenth Street, Ste. 4500
Denver, CO 80202
(303) 863-1000
Counsel for Petitioner

APPENDIX

APPENDIX A
(Opinion dated July 21, 2006)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 05-1085

HIGH COUNTRY CITIZENS ALLIANCE; TOWN OF CRESTED BUTTE, COLORADO; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO, PLAINTIFFS-APPELLANTS

v.

KATHLEEN CLARKE, in her official capacity as Director of the U.S. Bureau of Land Management; RON WENKER, in his official capacity as Colorado BLM Director; UNITED STATES BUREAU OF LAND MANAGEMENT; GALE NORTON, in her official capacity as Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; PHELPS DODGE CORPORATION; MT. EMMONS MINING COMPANY, DEFENDANTS-APPELLEES

July 21, 2006

Before: **KELLY**, **BRISCOE**, Circuit Judges and **JOHNSON**,* District Judge.

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* The Honorable William P. Johnson, District Judge, United States District Court for the District of New Mexico, sitting by designation.

KELLY, Circuit Judge.

High Country Citizens' Alliance, Town of Crested Butte, Colorado and the Board of Commissioners of the County of Gunnison, Colorado (collectively, Plaintiffs) appeal from the district court's dismissal, for lack of subject matter jurisdiction, of two claims of their three-claim complaint. Plaintiffs' complaint arises out the issuance of a mining patent and names two groups of defendants—federal defendants including the Bureau of Land Management (BLM), Kathleen Clark in her official capacity as BLM Director, Ron Wenker in his official capacity of the Colorado Bureau of Land Management Director, the United States Department of the Interior (collectively, BLM); and private defendants including Mount Emmons Mining Company (MEMCO) and Phelps Dodge Corporation[1] (collectively, MEMCO). The district court entered final judgment pursuant to Fed. R. Civ. P. 54(b) on the two claims involved in this appeal. Aplt. App. 56. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

Background

In December 1992, MEMCO filed a mineral patent application with the BLM, pursuant to the General Mining Law of 1872, 30 U.S.C. §§ 21-47, ("1872 Mining Law"). MEMCO sought a patent on approximately 174 acres of public land in the Gunnison National Forest. 30 U.S.C. § 29. MEMCO asserted in its application that these mining claims, located in 1977 (and amended in 1978), contained valuable deposits of molybdenum.

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[1] Phelps Dodge is the ultimate parent company of MEMCO.

Plaintiffs filed three separate administrative protests with the BLM, objecting to the grant of MEMCO's application. They argued that the mining claims MEMCO seeks to patent do not contain the required "discovery of a valuable mineral deposit" within each claim, and that the issuance of a patent for the acreage of the claims exceeds that allowed by the 1872 Mining Law. None of the Plaintiffs, now or ever, claim a competing property interest in any of the land.

The BLM determined that nine of MEMCO's claims satisfied patent requirements. On April 2, 2004, the BLM simultaneously dismissed the Plaintiffs' protests in a twelve-page decision, Aplt. Appx. at 61-72, and granted MEMCO a patent for nine of its claims, covering approximately 155 acres. The Plaintiffs filed suit against the BLM and MEMCO twelve days later, seeking declaratory and injunctive relief. In their complaint, the Plaintiffs asserted three claims: (1) the BLM violated the 1872 Mining Law and the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA") by granting MEMCO the patent, (2) the BLM violated the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by withholding certain documents from Plaintiffs, and (3) the BLM violated the Federal Land Policy and Management Act ("FLMPA"), 43 U.S.C. §§ 1701-1784, and the APA by depriving Plaintiffs an opportunity to review the patent application and failing to provide prompt notice of the denial of the protests and a statement of reasons for the denial.

Plaintiffs filed a motion for preliminary injunction on May 7, 2004, seeking to restore title in the patented lands to the United States. MEMCO filed a motion to dismiss all claims pursuant to Fed. R. Civ. P. 12(b)(6). The BLM filed a similar motion to dismiss with regards to the Plaintiffs' first and third claims pursuant to Fed. R. Civ. P. 12(b)(1), and answered the second claim.

On January 12, 2005, the district court granted BLM and MEMCO's motions to dismiss for lack of subject matter jurisdiction and denied the Plaintiffs' motion for a preliminary injunction as moot. Aplt. App. 39-55, 56. The district court then entered judgment on the first and third claims in favor of the various defendants pursuant to Fed. R. Civ. P. 54(b). The district court held that third parties who claim no ownership interest in the land subject to a mineral patent cannot challenge the issuance or validity of the patent under the 1872 Mining Law and have no right to relief under the APA. *Id.* at 43. On appeal, the Plaintiffs challenge that conclusion.[2] Specifically, the Plaintiffs argue that the district court erred by (1) ignoring the presumption of reviewability of agency actions under the APA, (2) holding that aggrieved persons cannot seek judicial review of BLM patenting decisions, (3) dismissing Plaintiffs' substantive APA claim, and (4) dismissing the private defendants from the case. The question of whether the APA waives sovereign immunity for Plaintiffs, who claim no adverse interest in the land, to bring a suit challenging the issuance of a patent under the 1872 Mining Law, is a matter of first impression.

Discussion

A. Standard of Review

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[2] The Plaintiffs do not challenge the dismissal of their claims under the FLMPA, and challenge the dismissal of their third claim only to the extent it alleges APA violations. They also do not challenge the dismissal of their FOIA claims against MEMCO. The Plaintiffs' second claim (FOIA) against the BLM is still pending in the district court and is not the subject of this appeal.

Because the district court dismissed the Plaintiffs' action for want of subject matter jurisdiction, we review the district court's grant of the motions to dismiss de novo. *Georgacarakos v. United States*, 420 F.3d 1185, 1186 (10th Cir. 2005); *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1294 (10th Cir. 2003) (grant of motion to dismiss under either Fed. R. Civ. P. 12(b)(1) or 12(b)(6) is reviewed de novo). We assume the truth of all facts Plaintiffs allege. *Georgacarakos*, 420 F.3d at 1186.

B. Subject Matter Jurisdiction-Federal Appellees

It is well settled that the Plaintiffs can only sue the BLM to the extent it waived its sovereign immunity. *E.g. United States v. Sherwood*, 312 U.S. 584, 586 (1941). While 28 U.S.C. § 1331 grants the court jurisdiction over all "civil actions arising under the Constitution, laws or treaties of the United States," it does not independently waive the Government's sovereign immunity; § 1331 will only confer subject matter jurisdiction where some other statute provides such a waiver. *City of Albuquerque v. United States Dep't. of the Interior*, 379 F.3d 901, 906-07 (10th Cir. 2004). Waiver of sovereign immunity must be explicit and cannot be implied. *Villescas v. Abraham*, 311 F.3d 1254, 1256-57 (10th Cir. 2002).

The APA serves as a limited waiver of sovereign immunity, not a grant of subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105-07 (1977); *City of Albuquerque*, 379 F.3d at 907; *New Mexico v. Regan*, 745 F.2d 1318, 1321 (10th Cir. 1984). It provides: "A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA withdraws that waiver of sovereign immunity, however, when the relevant statute, in this case the 1872 Mining

Law, "precludes judicial review." 5 U.S.C. § 701(a)(1).[3] In other words, before the waiver of sovereign immunity under § 702 of the APA applies, "a party must first clear the hurdle of § 701(a)." *Heckler v. Chaney*, 470 U.S. 821, 828 (1985); *Beamon v. Brown*, 125 F.3d 965, 966 (6th Cir. 1997) ("Under 5 U.S.C. § 701(a)(1), the APA does not waive sovereign immunity when statutes preclude judicial review.").[4]

A presumption of reviewability accompanies agency actions under the APA, but it may be overcome.[5] *Block*

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[3] The APA also does not permit review and hence waive sovereign immunity where the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The parties agree that this exception is not applicable here, and as such, we do not address it.

[4] Unlike the dissent, we view the question of whether the 1872 Mining Law precludes judicial review against a backdrop of sovereign immunity–if the review cannot be had under the APA due to § 701(a)(1) or (2), the government has not waived its sovereign immunity.

[5] The dissent takes the court to task for failing to acknowledge the presumption of judicial review and for holding the government to a lesser standard in demonstrating that judicial review is precluded. As we discuss, *Block* reaffirmed that the government must counter a presumption in favor of judicial review, but also warned against the use of strong evidentiary formulations (such as clear and convincing) in deciding the legal question of whether congressional intent precluding judicial review is fairly discernible. *Block*, 467 U.S. at 351. The presumption of judicial review controls where substantial doubt exists about congressional intent on the preclusion issue, but it is hardly conclusive in other circumstances. *Id.* ("[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling. That presumption does not control in cases

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v. Cmty Nutrition Inst., 467 U.S. 340, 349 (1984). In *Block*, the Supreme Court clarified its earlier "clear and convincing" standard to overcome the presumption of reviewability established in *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). Specifically, the Court found that the clear and convincing standard is "not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block*, 467 U.S. at 351. Two years later, the Supreme Court, relying on *Block*, reiterated that "Congress ordinarily intends that there be judicial review, and emphasized the clarity with which a contrary intent must be expressed." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (superceded and abrogated on other grounds). The Tenth Circuit, though characterizing the burden to overcome the presumption as "heavy," *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 641 (10th Cir. 1991), has consistently followed the *Block* standard. *See Rocky Mountain Radar, Inc. v. F.C.C.*, 158 F.3d 1118, 1121 (10th Cir. 1998).

To overcome the presumption of reviewability, an intent to preclude judicial review must be "fairly discernible" from the statutory scheme. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970). The fact that a statute does not explicitly provide for judicial review is not outcome determinative. *Id.* at

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. . . [where] the congressional intent to preclude judicial review is 'fairly discernible' in the detail of the legislative scheme."). Our use of the term "sufficient evidence" in reviewing this issue is done with full appreciation of satisfying the pertinent legal standards.

157. Rather, the Supreme Court set forth specific factors for courts to consider in analyzing whether, absent explicit language or explicit legislative history, the presumption of reviewability has been overcome: "The congressional intent necessary to overcome the presumption [of reviewability] may [ ] be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it . . . or from the collective import of legislative and judicial history behind a particular statute . . . [or] by inferences of intent drawn from the statutory scheme as a whole." *Block*, 467 U.S. at 349 (internal citations omitted).

The Plaintiffs maintain the district court ignored the presumption of reviewability. Aplt. Br. at 12.[6] We disagree. The district court cited and applied the *Block* factors which are pertinent in overcoming such a presumption. Aplt. Appx. 43-51. *Block* discusses the presumption and we are unwilling to assume that the district court missed the predicate and applied the *Block* factors for no apparent purpose.

The 1872 Mining Law provides that "valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." 30 U.S.C. § 22. Citizens can locate mining claims by discovering valuable mineral deposits on lands open to location. 30 U.S.C. §§ 22, 28. The 1872 Mining

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[6] We also disagree with the Plaintiffs' characterization of the district court's order as one based on a search for authorization of a private cause of action in the 1872 Mining Law. Aplt. Br. at 16. That is too narrow. A plain reading of the order indicates the district court applied the *Block* factors to determine if it was fairly discernable from the statute that Congress intended to preclude review.

Law permits a claim holder to obtain a patent (fee title) to the lands encompassed by the mining claim he or she holds. 30 U.S.C. § 29. The BLM must determine whether a patent application complies with all the statutory requirements. *Id.* After finding that it has, the BLM's issuance of a patent is ministerial. *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 501 (10th Cir. 1991).

The 1872 Mining Law provides a mechanism for resolving disputes over claim ownership or satisfaction of the patent requirements. The applicant must give notice to potentially competing claimants and provide the opportunity for competing claimants to file their adverse claims. 30 U.S.C. §§ 29-30. The law expressly creates a right of action for adverse claimants. 30 U.S.C. § 30. It also provides a process for third parties who claim no ownership in the land to file protests with the BLM, and provide evidence as to why the applicant has not satisfied the requirements for a patent. 30 U.S.C. § 29. The Plaintiffs agree they are not adverse claimants.

There is no express grant of judicial review in the 1872 Mining Law to those who protest unsuccessfully. As such, we look to the *Block* factors to determine whether there is sufficient evidence of congressional intent to preclude review.

Import of Legislative and Judicial History

Although the Plaintiffs are correct that "[c]ongressional intent in enacting the 1872 Mining Law was not for the unfettered development of public land," Aplt. Br. at 23 (emphasis omitted), the legislative history reveals that security of title was integral to and paramount in the passage of the mining laws. After a thorough review of the legislative history, we conclude that judicial review of a grant of a patent by a third party (with no

colorable property interest) conflicts with what Congress sought to achieve.

Because the 1872 Mining Law essentially served to combine and fine tune two earlier acts, the Lode Law of 1866 and the Placer Act of 1870, it is necessary to review the history of that legislation as well.[7] In 1864 during the Civil War, Congress began the debate over regulation of mining lands. Allowing a mechanism by which the government could sell the land and generate revenue to ease the war debt was the initial concern and much debate focused on how much, if any, to tax the mines. Cong. Globe, 38th Cong., 1st Session, 2557-2559 (1864). Congress sought not just an immediate solution to the war debt, but an end to the problem of vagrancy and lack of development plaguing the mining states. The solution of fixed interests became clear:

> I suppose two thirds of the area of California is what is called mining land. Not an acre of it has been surveyed. It has not been laid off into sections; it has not been laid off into small parcels, so that individuals can acquire rights to it. They go upon it temporarily and perhaps put up cabins; they stay there as long as they can work with some special advantage; but it is only a place for a day, or a month, or a season, and then they wander off to other places; whereas if they could acquire permanent rights they would make their homes there . . . . They have had no opportunity to acquire a right to the lands. The State of California

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[7] The dissent contends that the legislative history of the Lode Law and Placer Act is "irrelevant." Congress intended that the 1872 Mining Law would incorporate these statutes, Cong. Globe, 42nd Cong., 2d Session, at 532-34 (1872), and thus we find the legislative history of these acts extremely relevant to the analysis.

> would be twice as strong and twice as populous today if at an early period provision had been made whereby persons seeking rights there could secure permanent and fixed interests.

Id. at 2557. The development of mining was a critical concern. *See id.* at 2559 ("I say it is the first interest of the public . . . to have this wealth developed . . . I do not vote for any enactment that shall discourage the development of this wealth.").

Debate between the western senators and the eastern senators grew, as the eastern senators sought to maximize revenue, while the western senators sought to maximize development. *See* Cong. Globe, 38th Cong., 2d Session, at 684-687 (1865); Cong. Globe, 39th Cong., 1st Session, at 301 (1866). The one common thread was a desire to establish secure and permanent title to the land in the miners. *See* Cong. Globe, 38th Cong., 2d Session, at 684-687 (1865). Although Indiana Senator Julian's bill was eventually killed by the western senators concerned about his proposed taxation, permanent fee title in the land was a priority, even for the eastern senators. The practice of leasing the land "drew into the mining regions a population of vagrants, gamblers, and ruffians, excluding sober and intelligent citizens, and making the establishment of civil communities impossible." *Id.* at 685. Senator Julian compared the English system to that of the United States: "the English miner, having the freehold of the soil, husbands and improves his property, and follows the vein downward even to the distance of two thousand feet. The American lessee can only take what he finds near the surface of the ground." *Id.* He continued: "Where there is no security for land titles, no permanent communities can be established . . . . By denying permanent ownership in the soil, and thus preventing its improvement, it necessarily keeps down its value . . . . Men will not lend their capital to mining

projects where the title to the soil is in the Government, and cannot be pledged as security." *Id.* at 686. Thus among the disagreements between east and west, the importance of permanent title was one area where the senators found common ground.

In 1866, Nevada Senator Stewart introduced a bill that would eventually become the Lode Law of 1866.[8] Its provisions were similar to those of the 1872 Mining Law. Cong. Globe., 39th Cong., 1st Session, at 3225 (1866). Senator Stewart proposed this bill as a mechanism for "the Government to give title, so important for permanent prosperity" whose urgency increased "by the introduction of bills looking to what the miners regard as a general system of confiscation destroying all confidence in mining titles and by the *absolute necessity of some system guarantying to capitalists security for their investment.*" *Id.* at 3227 (emphasis supplied). Senator Stewart believed that the Lode Law of 1866 would "give stability to mining titles, invite capital, and greatly increase the production of the precious metals." *Id.* Security of title was a primary purpose of the 1866 Lode Law: "We want a law of the character of the bill under consideration to establish and secure mining titles. While these are in doubt a feeling of insecurity will paralyze all our efforts . . . . Let a just, liberal, and definite policy be adopted toward the miners. Add to their possession the absolute right of property, and you will have lain a solid foundation for large and increasing yields . . . . The feeling of security and independence produced by the

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[8] A lode is a vein of hard rock minerals, such as gold and copper, contained within surrounding barren rock. A placer claim acquires deposits of minerals at or near the surface, such as gold contained in river gravel. Richard W. Harris, *An Introduction to Mining Law*, 7 Nev. Law. 15, 15-16 (1999).

right of property in the soil is the real foundation of our stability . . . ." *Id.* at 3228.

The Placer Act of 1870 applied the provisions of the Lode Law to the patenting of lands with placer deposits. Once again, the senators stressed the importance of acquiring secure title as a prerequisite to making improvements on the land. Cong. Globe, 41st Cong., 2d Session, at 4403-04 (1870).

The Mining Law of 1872 essentially united the previous mining legislation and remedied problems that had developed with the implementation of those laws. Cong. Globe, 42nd Cong., 2d Session, at 532-34 (1872). Senator Sargent explained:

> We are inducing miners to purchase their claims, so that large amounts of money are thereby brought into the Treasury of the United States, causing the miners to settle themselves permanently, to improve and establish homes, to go down deeper in the earth, to dig further into the hills, and in every way improve their own condition . . . . This bill simply oils the machinery a little.

Id. at 534.[9] Congress, in passing the 1872 Mining Law, was in search of a more definite rule because, in part,

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[9] The dissent suggests these excerpts of legislative history are "selective" and not in accordance with text and structure of the Mining Law. We disagree with the dissent's characterization of the history reported here as "selective." According to the dissent, the legislative history is completely opposite of what was enacted–provisions that actually increase litigation rather than decrease it. While an interesting theory, the right of action for adverse claimants the Mining Law provides for, 30 U.S.C. § 30, is consistent with an interest in finality because it narrows and defines the class of people that could bring an action. The third party protest procedure,

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"the whole region was in litigation." *Id.* at 2459. Essential to this definitiveness was certainty in one's title by the finality inherent in the issuance of a patent:

> The object of the patent is to give title; it cuts off all uncertain title; if the person wants to improve a claim he can go and buy it, and it becomes private property, and it is certainly the best policy to have any kind of property improved that it shall become private property. Men think more of a patented claim than they do of one that is not patented. They will spend millions in prospecting a patented claim where they will not spend hundreds of dollars to prospect a claim where the title is uncertain and liable to be disturbed by somebody outside.

Id.

This legislative history reflects a clear concern with the finality of the patent as a prerequisite to miners being willing to invest the necessary time and capital to develop the industry.

The Plaintiffs argue that the 1872 Mining Law is not a one-way street towards patenting, but rather an effort to balance the needs of the mining industry with those of non-mining users such as homesteaders, railroads and other interests, presumably the need of the national treasury. Aplt. Br. at 24-25. First, the interests Plaintiffs identified are not necessarily competing interests to the mining industry. A prosperous west as a result of the mining expansion would simultaneously stimulate the

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30 U.S.C. § 29, also reflects this concern–such protests are made before the patent issues, enabling the issuance of a patent to be final. In addition, *Block* directs us to examine the legislative history in our analysis.

national treasury, the interests of homesteaders and the railroads. Second, the Plaintiffs' interests are primarily recreational and environmental, two interests that were not paramount at the time Congress sought to develop the economy through mining.

It is beyond doubt that in 1872 Congress was concerned with finality of title. Permitting a challenge by third parties with no interest in the land would allow the kind of lengthy litigation over rights that a patent was designed to avoid. This would no doubt frustrate the purpose of the 1872 Mining Law, as Congress envisioned it then. We recognize that over the last 133 years, interests, concerns and priorities have shifted. Many have called for the revision and repeal of this seemingly antiquated law. *See e.g.* Robert J. Uram, *Prospects for Mining Law Reform*, 12 Nat. Resources & Env't 191 (1998). But that responsibility for change lies with Congress, not the courts. At its core, the 1872 Mining Law was about ensuring the settled expectations of the emerging mining corporations. *See e.g.*, Meyer & Riley, Public Domain, Private Dominion, Sierra Club Books, 46, 52, 56, 78 (1985) (noting that "[p]roviding the[] powerful interests [of the mining corporations] with security of ownership, protection against popular hostility, and the opportunity to advance their control at the state level were the compelling motivations behind the legislation," and "the 1872 Mining Law creates a presumption in favor of mining that is difficult– if not impossible– to overcome . . . [it] is the Magna Carta of mining on public land; its provisions have a status higher than that of ordinary law"); Carl J. Mayer, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. Chi. L. Rev. 624, 648 (1986) (the impetus for the 1872 Mining Law had everything to do with the mining corporations).

Next we consider judicial construction of the 1872 Mining Law. It is essentially undisputed that the cases, both contemporaneous with the 1872 Mining Law and subsequent to the enactment of the APA, uniformly preclude persons situated similarly to Plaintiffs, that is, not claiming a property interest in the land, from judicially contesting the validity of the patent. Although the APA changed the landscape of reviewing agency decisions, these cases, while not dispositive, are nonetheless instructive. As early as 1881, the Supreme Court held that an issued patent:

> not merely operates to pass the title, but is in the nature of an official declaration by that branch of government to which the alienation of the public lands, under the law, is intrusted (sic), that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation.

Smelting Co. v. Kemp, 104 U.S. 636, 640-41 (1881). Absent a challenge to the BLM's jurisdiction, a "patent is unassailable for mere errors of judgment." *Id.* at 646. *See also Steel v. St. Louis Smelting and Refining Co.*, 106 U.S. 447, 451 (1882) (the BLM "must consider and pass upon the qualifications of the applicant, the acts he performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal

and is unassailable except by direct proceedings for its annulment or limitation" based on lack of jurisdiction).[10] The courts were also clear that it "does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it." *Smelting Co.*, 104 U.S. at 647; *see also Iron Silver Mining Co. v. Campbell*, 135 U.S. 286, 301 (1890) ("When [a person] has once obtained the patent of the United States for his land, *he should be only required to answer persons who have some established claim.*") (emphasis added); *Sparks v. Pierce*, 115 U.S. 408, 413 (1885) ("To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department, and being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied to him."); *Wight v. Dubois*, 21 F. 693, 694 (C.C.D. Col. 1884) (in a patent issue, "when grantor and grantee are satisfied, a stranger has nothing to say").

The Plaintiffs' arguments that these cases are irrelevant because they involved suits between private parties is not persuasive. At its core, the goal–to

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[10] We are not persuaded that *Smelting Company* and *Steel* should be dismissed or disregarded because "they involved the distinction between courts of law and equity." The dissent completely ignores the extensive language in both opinions supporting the idea of finality of patent. *See Smelting Company*, 104 U.S. at 644-47 (referring to the "conclusiveness of a patent" as a "doctrine"). We think that *Block* requires us to consider contemporaneous cases.

invalidate the patent–is the same, and the courts' resolutions of these questions is indicative of an emphasis on finality. Nor does the Plaintiffs' urging that "pre-APA caselaw is inapplicable" persuade us. *Block* explicitly directs courts to consider these contemporaneous constructions and the judicial history as a whole, regardless of shifting and evolving interests. In arguing that the general public's interest is paramount, Aplt. Br. 23-24, the Plaintiffs miss the point. While they are correct in their assertion that the Supreme Court has recognized the interest of the public in making sure the patents conform to law, *Cameron v. United States*, 252 U.S. 450, 460 (1920), the mechanism Congress established is an administrative one (through the BLM), not a judicial one.

In *Wight*, the court confronted almost the same situation as here. It rejected an attempt by a party claiming no property interest in the land to challenge the issuance of a mining patent in the courts and found that the sole remedy was to file an objection before the Land Department. *Wight*, 21 F. at 693-94, 696. The court determined that once the Land Department overrules the protest, there is "no further right or remedy." *Id.* at 696. The *Wight* court, interpreting the 1872 Mining Law, compared a protestant's situation to that of an amicus curiae and held that where the Land Department has rejected the protest, "the protestant has no further standing to be heard anywhere. The protest cannot be made the basis of any litigation in the court." *Id.*; *see also Beals v. Cone*, 188 U.S. 184, 187 (1903) ("There is no suggestion in the pleadings that the protestants were in any way interested in the ground applied for, or that they were acting other than as good citizens, seeking to prevent a wrong upon the government. Their standing in the

proceeding was in the nature of amici curioe [sic]."); [11] 2 Am. Law of Mining §§ 53.04, 53.06 ("the protestant cannot, by filing a protest, acquire any right or equity in the land which can be made the basis of a suit . . . to cancel the patent . . . . A protestant who does not allege an interest in himself stands solely in the position of amicus curiae.").

Although we have been unable to find, and the parties have not provided, a case directly on point, analogous situations after the enactment of the APA provide some insight. On balance, when viewed as a whole and in light of the legislative history, the modern judicial history also supports our conclusion.

Several cases have indicated that those in the Plaintiffs' position, who assert no competing interest in the land, have no right of action to challenge the issuance of a patent. Discussing land patents, the Ninth Circuit has emphasized that "a United States patent is protected from easy third-party attack. It is not sufficient for one challenging a patent to show that the patentee should not have received the patent; he must also show that he (the challenger) is entitled to it." *Kale v. United States*, 489 F.2d 449, 454 (1973) (internal citations omitted); *see also Leisnoi, Inc. v. United States*, 313 F.3d 1181, 1185 (9th

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[11] Although the dissent correctly notes that *Beals* presented the question of whether a protester, who was not a party in the prior proceeding, could invoke res judicata, the court's characterization of the protesters as amicus curiae is telling. The fact that the protesters asserted no interest in the land, and were acting as "good citizens" led the court to conclude that they were not parties in interest, and as such, could not invoke res judicata. *See Beals*, 188 U.S. at 187.

Cir. 2002).[12] Moreover, as recently as 1999, the Ninth Circuit relied on *Smelting Co.* to define a patent as "an official declaration of title which is, with limited exceptions, unassailable and not rebuttable." *United States v. Shumway*, 199 F.3d 1093, 1096 (9th Cir. 1999).[13]

In an action between two private parties challenging the validity of a patent, the Ninth Circuit, relying on St. Louis Smelting, again came down on the side of finality:

> As a matter of federal law, it is well established that the validity of a deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee . . . . Simply stated, a plaintiff in such a case has no cause of action. These holdings are supported by sound reason. When public lands are conveyed to private individuals, a contractual relationship is created between the Government and the grantee; the integrity of such transactions could be upset if a grantee . . . became liable to an amorphous class of third persons.

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[12] The dissent points out what we readily acknowledge: several cases we must consider including *Kale*, *Leisnoi* and *Raypath* are not directly on point because they do not involve the 1872 Mining Law. These cases did however, involve land patents and land appropriation and are instructive in analyzing the propriety of third-party involvement.

[13] The Plaintiffs argue that *Shumway* is irrelevant because the patent discussion is dicta and was not dealing with judicial review under the APA. Aplt. Br. at 31. We consider it for what it is worth–in a case of first impression, we survey the body of judicial history available, if only for the sake of completeness.

Raypath, Inc. v. City of Anchorage, 544 F.2d 1019, 1021 (9th Cir. 1976) (internal citations omitted).

Although *Raypath* is not factually identical to the instant action because it involved a suit between private parties, Aplt. Br. at 30, the effect is really the same– here, the Plaintiffs attempt to state a claim against the BLM, but the effect of their victory would be to divest MEMCO of its patent. It cannot be that what one cannot achieve directly, he is permitted to achieve indirectly, especially when that end, divestiture of title, was one of Congress' primary concerns when it passed the 1872 Mining Law.

The Plaintiffs also suggest that the district court overlooked several cases allowing judicial review of patenting decisions under the APA, despite no express provision in the 1872 Mining law allowing judicial review. Aplt. Br. at 35-41 (citing, e.g., *Exxon Mobil Corp. v. Norton*, 346 F.3d 1244, 1248 (10th Cir. 2003); *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250, 1257 (10th Cir. 2002); *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997); *see also Adams v. Witmer*, 271 F.3d 29, 34 (9th Cir. 1958)). As we discuss below, cases must be read against their facts, and these cases generally involve patent applicants seeking judicial review of the denial of a patent, not strangers to the title seeking judicial review of the grant of a patent to another. Although the Plaintiffs suggest that these situations should merge, the former involve mining claimants asserting property rights, not a potentially unlimited number of third-parties without such rights seeking to invalidate the property rights of others. Given an administrative review process for third-party issues, and the long judicial construction prior to the APA which did not permit

judicial review of such claims, we would be hard pressed to conclude that the APA changed this.[14]

In supplemental briefing, the Plaintiffs argue that this circuit's recent decision in *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735 (10th Cir. 2005) ("SUWA"), resolves the question before this court. There, several environmental organizations brought suit against the BLM to enjoin a county road construction project across BLM land. This court rejected a BLM argument that the BLM had authority to rule on the counties' rights of way. The argument was based on *Cameron*, 252 U.S. 450, which upheld the BLM's power to determine the validity of unpatented mining claims. In so ruling, this court made the following observation about protests to the issuance of a patent under the 1872 Mining Law:

> Furthermore, when a private party protests the issuance or nonissuance of a patent, the BLM has the authority to hold a hearing and pass on the applicant's compliance with the statutory requirements. This determination is binding on courts, reviewable only in accordance with administrative law or in a direct action to cancel, modify, or issue the patent . . . . Once title passes, however, the BLM loses authority

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[14] The dissent urges reliance on *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980), strongly implying that the State (without an ownership interest) was permitted to assert its rights in a challenge to a patent under the 1872 Mining Law. In *Andrus*, the *BLM* was the party that brought suit, and South Dakota, which sought to intervene, was permitted to file an amicus brief. *Andrus*, 614 F.2d at 1192. Moreover, the state's subsequent action seeking an order compelling an environmental impact statement did not implicate the finality of a patent because it dealt with issues prior to the patent's issuance.

> over the subject lands, and the title granted by the patent can be challenged only through the courts.

Id. at 754 (internal citations omitted). The Plaintiffs argue that this language establishes the jurisdiction of the courts to hear challenges such as the one in the instant action. We disagree. The cases relied on by the panel for this proposition, *Smelting Co.* and *Cameron*, do not support any right of review for those with no claimed interest in the patented land, and in fact, argue against such a construction.[15]

As previously noted, most of the cases on which Plaintiffs rely recognize reviewability of claims by those who *assert an interest in the land*- either litigants whose patent application was denied[16] or those asserting a competing claim (whose right to review the 1872 Mining Act explicitly recognizes in §30). Aplt. Br. at 35-41; Aplt. Reply at 12-13 & n.3 (citing, *e.g.*, *Babbitt*, 117 F.3d 1167; *Brennan v. Udall*, 379 F.2d 803 (10th Cir. 1967); *Adams*, 271 F.2d 29). The question is not, as the Plaintiffs frame it, whether the court can review BLM decision making under the APA. *See* Aplt. Br. at 36. The question, rather, is whether third parties claiming no interest in the land can challenge the issuance of a patent. Allowing review of claims by adverse claimants or those whose patent the BLM denied, addresses a fundamentally different concern than allowing *any and all* unrelated third parties to embroil a mineral patent holder in litigation.

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[15] One might point out that *Smelting* and *Cameron* were decided before the APA, yet necessarily relied upon by the Plaintiffs here.

[16] We discuss these two categories together because both involve property interests in the subject lands. An unpatented mining claim is a fully recognized possessory interest. United States v. Locke, 471 U.S. 84, 86 (1985).

Plaintiffs acknowledge this distinction, Aplt. Br. at 37, but argue that these cases indicate we are to look to the APA for a cause of action, not to the 1872 Mining Law. That is precisely what we do here; the APA inquiry, however, must turn on whether congressional intent to preclude review is fairly discernable, bringing the action outside the APA's scope; and as such, the inquiries go hand in hand.

Contemporaneous judicial construction and congressional acquiescence.

Congress has never revised the 1872 Mining Law to evidence disagreement with the holdings of cases such as *Smelting Co.*, *Steel*, and *Wight*, which held that judicial challenges to patents by third parties were barred. To find that Congress has acquiesced in a court or agency interpretation, the BLM and MEMCO must show by "abundant evidence that Congress both contemplated and authorized" the interpretation at issue. *Catron County Bd. of Comm'rs, NM v. United States Fish and Wildlife*, 75 F.3d 1429, 1438 (10th Cir. 1996) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986)).

Congress has enacted multiple changes to the Mining Law. *See e.g.*, The Multiple Use Mining Act of 1955, 30 U.S.C. §§ 601-603, 611-615 (withdrawing materials like sand, gravel, stone and clay from the purview of the Mining Law); Multiple Mineral Development Act of 1954, 30 U.S.C. §§ 521 *et seq.* (allowing mining claims and mineral leases to exist on the same land and resolve conflicts when development occurred under both the 1872 Mining Law and the Mineral Leasing Act of 1920); The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et. seq.* (establishing leasing program for oil, gas, sodium, phosphate, oil shale and potash); Act of February 12, 1903, 32 Stat. 825 (providing for assessments on oil

mining claims); Act of January 31, 1901, 31 Stat. 745 (extending mining laws to saline lands); Act of June 6, 1900, 31 Stat. 321 (extending mining laws to Alaska); Act of February 11, 1897, 29 Stat. 526 (extending placer mining laws to lands containing petroleum).

Despite these many revisions, Congress has not chosen to amend the 1872 Mining Law to provide Plaintiffs with a right of action. Whether Congress has acquiesced in the judicial interpretations of *Smelting Co.*, *Steel*, and their progeny is a difficult and close question. *See Catron*, 75 F.3d at 1438; *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994). Congressional silence alone is not enough to prove acquiescence. *See e.g., Brown v. Gardner*, 513 U.S. 115, 121 (1994); *Schor*, 478 U.S. at 846; *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Catron*, 75 F.3d at 1438. Silence as to one area, however, coupled with a myriad of revisions within the same statutory scheme begins to look like acquiescence. *See Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 629 n.7 (1987) ("Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct."); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763-64 (1998); *Ankenbrandt*, 504 U.S. 689, 700-01 (1992). Regardless, we find consideration of the other *Block* factors sufficient to evidence an intent to preclude review.

Statutory Scheme as a Whole

The statutory scheme of the 1872 Mining Law is indicative of Congress' intent to preclude review to those with no adverse claim in the patented land. We disagree with the Plaintiffs' apparent argument that the substantive requirements for a patent somehow support a right of action for third parties with no interest in the land. Aplt.

Br. 21-23. The substantive requirements have no bearing on what class of people Congress envisioned being able to challenge an issued patent. Moreover, the BLM's determination of the satisfaction of these requirements gives rise to a conclusive presumption of satisfaction, *see e.g. Creede & Cripple Creek Mining and Milling Co. v. Uinta Tunnel Mining and Transp. Co.*, 196 U.S. 337, 353 (1905), a further demonstration of Congress' concern with finality.

Rather, we examine the provisions Congress included to resolve disputes. In 30 U.S.C. § 29, Congress made a limited provision for the role of third parties:

> If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43.

This "objection" has been defined as a protest. 43 C.F.R. § 3872.1; *see also Wight*, 21 F. at 696. Neither the statute, nor the BLM regulations provide the protestant with rights of appeal. *See* 30 U.S.C. §§ 29-30; 43 C.F.R. § 3872.1. The 1872 Mining Law also sets forth a detailed procedure that adverse claimants must follow and provided that the adverse claimant timely files his claim, the Mining Law grants the adverse claimant an opportunity to have the claim adjudicated in a court, prior to the BLM's final decision on the patent application. Plaintiffs could not avail themselves of this procedure. *Compare* 30 U.S.C. § 30 *with* 2 Am. Law of Mining, §

53.08 ("A protestant who claims no interest in himself which would be affected by the issuance of a patent cannot question the judgment of the manager of the land office . . . in passing upon the application and his protest and is not entitled to appeal such decision.").

Together, Sections 29 and 30 provide a mechanism to settle disputes between the patent applicant and adverse claimants and allow others to bring to the BLM's attention any other reason why the patent should not issue. *See Enterprise Mining Co. v. Rico-Aspen Consol. Mining Co.*, 66 F. 200, 208 (8th Cir. 1895) ("There is no doubt that the object of these provisions of the act of congress is to require the conflicting claims of all parties to be adjusted before the patent issues.").

The Plaintiffs argue that inclusion of third parties in the statutory scheme is inconsistent with the conclusion that Congress intended to preclude review. Aplt. Reply Br. at 17-18. Congress provided for third party participation in the administrative process, and thus, the Plaintiffs reason, they must be able to avail themselves of judicial review. We disagree. Congress, by providing a right of action for adverse claimants, 28 U.S.C. §§ 29,30, certainly knew how to provide one for unsuccessful protesters. Rather, the ability of protesters to appear and bring information before the BLM reflects a Congressional desire to have all information before the BLM so that, when the BLM renders a decision, and issues a patent, the patent will be final. The limited role that the protesters play in the statutory scheme, coupled with congressional interest in finality and security of title, persuade us that the statutory scheme as a whole suggests an intent to preclude review. We acknowledge that APA jurisdiction is not dependent on an express or implied private right of action in the 1872 Mining Law, but we cannot ignore how that act functions with the perfectly predictable range of disputes that might occur under it,

Despite the presumption of reviewability, it is fairly discernable here, after consideration of all the *Block* factors,[17] that Congress, when it enacted the 1872 Mining Law, intended to preclude judicial review to third parties claiming no property interest in the patented land and to date has not chosen to change this approach. As such, we find that the Plaintiffs have no federal right of action against the BLM.

C. 5 U.S.C. § 555(e) Claim

The Plaintiffs also bring suit, alleging substantive violations of the APA. Specifically, § 555(e) provides:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with an agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

5 U.S.C. § 555(e).

Even if the BLM did violate this notice provision, the Plaintiffs have no remedy. The purpose of this provision is to allow a reviewing court to assess the agency's

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[17] The dissent reasons that the facts of *Block* (with no provision for consumer involvement in agency proceedings) suggest a contrary result here. The argument is that because Congress provided for third party involvement in the agency review process, third parties must have a right of action in the courts. This correlative does not necessarily follow. Here, the Mining Law expressly provides for a right of action for adverse claimants, and thus had Congress intended to expand the scope of protester involvement beyond the agency stage, it certainly could have done so.

decision. *See Friends of the Bow v. Thompson*, 124 F.3d 1210, 1214-15 (10th Cir. 1997); *see also Thompson v. Dep't of the Treasury*, 533 F. Supp. 90, 96 (D. Utah. 1981). Here, there is no such right of review available to the Plaintiffs. As such, they failed to identify any prejudice suffered or damage incurred that would entitle them to relief. Moreover, the Plaintiffs cannot challenge the patent under the 1872 Mining Law, and we will not allow them to do so indirectly. We find that the district court properly dismissed this claim.

D. Subject Matter Jurisdiction- MEMCO

The Plaintiffs acknowledge that the 1872 Mining Law provides no private right of action. *See* Aplt. Br. at 32, 48. Rather, they argue that the private Defendants, MEMCO and Phelps Dodge Corporation, are necessary parties within Fed. R. Civ. P. 19(a) because an order declaring the granting of the patents invalid would destroy or impair their legal entitlements. Because we find the Plaintiffs have no right of action against the BLM, the district court properly dismissed the private Defendants.

E. Standing

In light of our jurisdictional ruling, we need not reach the issue of whether the Plaintiffs have standing under Article III.

AFFIRMED.

No. 05-1085, *High Country Citizens' Alliance, et al. v. Clarke, et al.*

BRISCOE, J., dissenting:

I respectfully dissent. This is a Rule 12(b)(6) dismissal, which we review *de novo*. The outcome of this case revolves around whether Congress intended the 1872 Mining Law to preclude judicial review under the APA. The narrow issue presented is whether the agency has overcome the strong presumption favoring judicial review of the agency's action under the APA, where the text of the 1872 Mining Law expressly provides for participation by protesters in the agency proceeding.

I. Sovereign immunity is not at issue

Although the majority and the district court frame the controlling issue as whether the APA waives sovereign immunity for plaintiffs to challenge the issuance of a patent pursuant to the 1872 Mining Law, sovereign immunity is not at issue in this case.

According to the district court, "[t]he two exceptions to the waiver of sovereign immunity under [5 U.S.C.] § 702 are: (1) when a statute specifically precludes judicial review of agency action, or (2) when the subject action is committed to the agency's discretion by law. 5 U.S.C. § 701(a)." Order 01/12/05, at 7. The district court reasons, "[t]hus, if the 1872 Mining Law precludes Plaintiffs' claims against Federal Defendants, then the Federal Defendants are entitled to sovereign immunity." Order 01/12/05, at 7. The majority appears to agree with the district court that this case turns on whether the plaintiffs' claims are barred by sovereign immunity, mentioning "sovereign immunity" several times and framing the issue as "whether the APA waives sovereign immunity for

Plaintiffs." Maj. Op. at 4a.[1] Contrary to the district court's and the majority's assertions, sovereign immunity is not at issue.

The district court's and majority's analysis conflicts with the APA. *See* 5 U.S.C. §§ 701(a), 702. According to 5 U.S.C. § 701(a), "[t]his chapter applies, according to the provisions thereof, except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Section 702 waives sovereign immunity "in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity." *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1081 (10th Cir. 2006) (internal quotation marks omitted); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005). While 5 U.S.C. § 702 of the APA waives sovereign immunity, 5 U.S.C. § 702 includes two exceptions to the waiver of sovereign immunity: "Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702; *Robbins*, 438 F.3d at 1080; *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961 (10th Cir. 2004).

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[1] The majority also asserts that "Plaintiffs can only sue the BLM to the extent it waived its sovereign immunity." Maj. Op. at 5a. Without explanation, the majority "view[s] the question of whether the 1872 Mining Law precludes judicial review against a backdrop of sovereign immunity – if the review cannot be had under the APA due to § 701(a)(1) or (2), the government has not waived sovereign immunity." Maj. Op. at 6a n.4.

Contrary to the district court's and majority's assertions, 5 U.S.C. § 701(a) does not list exceptions to the APA's waiver of sovereign immunity, which are actually listed in 5 U.S.C. § 702. 5 U.S.C. § 701(a) lists two instances where the APA would not apply to agency action, and it does not address the APA's waiver of sovereign immunity. Thus, if the 1872 Mining Law precludes judicial review under 5 U.S.C. § 701(a), as the district court and majority contend, then the APA simply does not apply.

II. There is a strong presumption favoring judicial review

The APA applies to agency action, unless the relevant "statute[] preclude[s] judicial review." 5 U.S.C. § 701(a)(1). "The APA confers a general cause of action upon persons 'adversely affected or aggrieved by agency action' . . . , but withdraws that cause of action to the extent the relevant statute 'preclude[s] judicial review.'" *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (quoting 5 U.S.C. § 702 and 5 U.S.C. § 701(a)(1), respectively).

The majority incorrectly describes the burden of proof to show preclusion of judicial review pursuant to 5 U.S.C. § 701(a)(1). Without imposing the burden on the agency, the majority observes generally that "[a] presumption of reviewability accompanies agency actions under the APA, but it may be overcome." Maj. Op. at 6a. The majority fails to charge the agency with the burden to establish preclusion, and it fails to apply the strong presumption favoring judicial review.

The agency must demonstrate "nonreviewability," which is the "exception" because "judicial review of such administrative action is the rule." *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970). More specifically, the agency "bears the *heavy burden* of overcoming the *strong*

presumption that Congress did not mean to prohibit all judicial review." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (emphasis added); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *McAlpine v. United States*, 112 F.3d 1429, 1432 (10th Cir. 1997).

The majority requires a lower evidentiary showing to establish that judicial review is precluded. Despite the strong presumption favoring judicial review, the majority appears to conclude that judicial review is precluded upon a showing of sufficient evidence. Without citation to any authority, the majority suggests that the *Block* inquiry is equivalent to a review for sufficiency of the evidence: "[W]e look to the *Block* factors to determine whether there is sufficient evidence of congressional intent to preclude review." Maj. Op. at 9a; *see also id.* at 28 ("[W]e find consideration of the other *Block* factors sufficient to evidence an intent to preclude review."). This standard is incorrect.

In contrast to the standard applied by the majority, the agency must show more than sufficiency of the evidence to show implied preclusion of judicial review. The Supreme Court has stated that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (internal quotation marks omitted); *Block*, 467 U.S. at 350-51 (explaining that the "'clear and convincing evidence' standard is not a rigid evidentiary test"). The majority narrowly construes *Block*, contending that "[t]he presumption of judicial review controls where substantial doubt exists about congressional intent on the preclusion issue, but it is hardly conclusive in other circumstances." Maj. Op. at 6a n.5. Contrary to the majority's assertion, the Court held that "the presumption favoring judicial review [is] overcome, whenever the congressional intent to preclude judicial review is fairly discernible in the

statutory scheme." *Block*, 467 U.S. 340, 350-51 (1984) (internal quotations omitted). "[J]udicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Wyoming v. United States*, 279 F.3d 1214, 1236 (10th Cir. 2002) (internal quotation marks omitted). Given the strong presumption favoring reviewability, the *Block* inquiry requires a more rigorous showing than a mere sufficiency of the evidence.

III. The agency has not shown implied preclusion of judicial review

I also disagree with the majority's application of the *Block* inquiry to the 1872 Mining Law. The BLM asserts three arguments in support of implied preclusion: (1) contemporaneous judicial construction and acquiescence; (2) legislative and judicial history; and (3) statutory scheme. *See Block*, 467 U.S. at 349. In holding that Congress intended to preclude judicial review, the majority relies upon the legislative and judicial history and the statutory scheme, but not the contemporaneous judicial construction and acquiescence. Maj. Op. at 25a. The agency fails to show that Congress intended to preclude judicial review.

A. Legislative and judicial history

Because the legislative history and judicial history conflict with the text of the Mining Law, the agency fails to show that judicial review is precluded. Nonetheless, the majority attempts to find preclusion, relying on legislative history of statutes that preceded the enactment of the Mining Law and legislative history that conflicts with the text of the Mining Law.

For example, the majority relies upon the legislative history of the Lode Law of 1866 and the Placer Act of

1870. Maj. Op. at 10a. The legislative history of these earlier statutes is irrelevant in determining whether Congress intended to preclude judicial review in the 1872 Mining Law, especially where the Mining Law alone allowed protesters to participate. *See* 14 Stat. 251, 251-53 (1866); 16 Stat. 217, 217-18 (1870). The majority asserts that the legislative history of the Lode Law and the Placer Act are "extremely relevant" because "Congress intended that the 1872 Mining Law would incorporate these statutes," citing three pages from the congressional debates concerning the 1872 Mining Law. Maj. Op. at 10a n.7 (citing Cong. Globe, 42nd Cong., 2d Session, at 532-34). Although there are several statements regarding the representatives' concern that the passage of the 1872 Mining Law not affect existing rights under the prior statutes, there is no statement in the congressional debate regarding the "incorporation" of the Lode Law or the Placer Act into the 1872 Mining Law. *See* Cong. Globe, 42nd Cong., 2d Session, at 532-34.

Moreover, the text of the Mining Law actually conflicts with the majority's selective quotations from the legislative history. In quoting from the legislative history, the majority emphasizes the finality of the patent and a desire to decrease litigation. For example, the majority states that "Congress, in passing the 1872 Mining Law, was in search of a more definite rule because, in part, 'the whole region was in litigation.'" Maj. Op. at 14a (quoting Cong. Globe, 42nd Cong., 2d Session, at 2459). The majority concludes that the "legislative history reflects a clear concern with the finality of the patent." Maj. Op. at 14a. From these statements in the legislative history, the majority concludes that "[p]ermitting a challenge by third parties with no interest in the land would allow the kind of lengthy litigation over rights that a patent was designed to avoid." Maj. Op. at 15a. But these quotes from legislative history, which serve as the foundation for the majority's

ultimate conclusions, conflict with the text and structure of the Mining Law.

While the majority cites scattered comments in the legislative history to emphasize the finality of the patent and reflect a desire to decrease litigation, the text and structure of the Mining Law actually *increased* litigation. The Mining Law provides an express cause of action for adverse claimants, who assert ownership interest over the land and are competing for title. 30 U.S.C. § 30. Additionally, the Mining Law allows third parties to participate in the agency proceeding by filing a protest with the BLM to provide evidence as to why the applicant has not satisfied the requirements for a patent. 30 U.S.C. § 29. Congress allowed third-party protesters to participate in the administrative proceeding, even though these third parties claimed no ownership interest in the land, and even though neither the administrative state nor modern principles of standing had developed. Thus, Sections 29 and 30 unquestionably *increased* litigation over the issuance of a patent by granting adverse claimants a cause of action and allowing third parties to participate in the administrative proceeding. In our preclusion analysis, we should give greater weight to the statute's text, and little, if any, weight to legislative history that conflicts with it.

Just as legislative history does not establish that Congress intended to preclude judicial review, neither does judicial history. In considering judicial history, the majority relies upon cases from the 1880s, but these cases have little, if any, applicability to the questions presented.

None of the majority's cases involve preclusion of judicial review as to a protester's challenge of the BLM's determination. *See Beals v. Cone*, 188 U.S. 184, 187 (1903); *Sparks v. Pierce*, 115 U.S. 408, 413 (1885); *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. 447, 451

(1882); *Smelting Co. v. Kemp*, 104 U.S. 636, 640-41 (1881); *Wight v. Dubois*, 21 F. 693, 696 (C.C.D. Colo. 1884). These cases do not support the majority's conclusion that Congress intended to preclude judicial review of the BLM's decisions in the Mining Law.

Additionally, the majority's cases are distinguishable because they concerned the limited concept of standing at the time. *See, e.g., Smelting Co.*, 104 U.S. at 645-47. For example, the majority quotes *Wight* for the proposition that "'the protestant has no further standing to be heard anywhere. The protest cannot be made the basis of any litigation in the court.'" Maj. Op. at 18a (quoting *Wight*, 21 F. at 696). But the analysis in *Wight* rested upon the premise that a protester, in 1884, had no standing to sue in court regarding the issuance of a patent. *Wight*, 21 F. at 696. Notably, the court's decision in *Wight* did not concern Congressional intent to preclude judicial review under the Mining Law.

The majority quotes *Beals v. Cone*, 188 U.S. 184 (1903), for the proposition that the plaintiffs' "'standing in the proceeding was in the nature of amici curioe [sic]'" because they had no ownership interest. Maj. Op. at 18a-19a (quoting *Beals*, 188 U.S. at 187). But this statement is quoted out of context. In *Beals*, the Court held that the plaintiff could not invoke *res judicata* because he was not a party in the prior proceeding, even though he filed a protest. 188 U.S. at 187. The Court held that the protesters, including plaintiff, could not use res judicata because protesters were not parties, and "[t]heir standing in the proceeding was in the nature of amici curioe [sic]." *Id.*

Moreover, the Supreme Court's decisions in *Smelting Company* and *Steel* are distinguishable because they involved the distinction between courts of law and of equity. *See Smelting Co.*, 104 U.S. at 645-47 (1881);

Steel, 106 U.S. at 452-53 (holding that, while the plaintiff could not assail a patent based on a false and perjured affidavit in an action at law, he could seek relief from a court of equity if he had an equitable right to the premises). Thus, although the majority relies upon cases from the 1880s, these cases do not support the majority's conclusion.

The majority bolsters its conclusion using modern judicial history, Maj. Op. at 19a-20a, but these cases are distinguishable because they did not involve the Mining Law. For example, the majority relies upon *Kale v. United States*, 489 F.2d 449 (9th Cir. 1973), Maj. Op. at 19a, but *Kale* did not involve the Mining Law. Instead, in *Kale*, a Chickasaw Indian claimed that the agency improperly denied his allotment petition-application by determining that the land at issue was previously appropriated pursuant to the Soldier's Additional Homestead Rights, 43 U.S.C. § 274. *Kale*, 489 F.2d at 453-54. Similarly, *Leisnoi, Inc. v. United States*, 313 F.3d 1181 (9th Cir. 2002), is also cited, but *Leisnoi* did not involve the 1872 Mining Law. Maj. Op. at 19a. Instead, *Leisnoi* involved a patent issued under the Alaska Native Claims Settlement Act and a suit against the United States under the Quiet Title Act, 28 U.S.C. § 2409a. 313 F.3d at 1182-83.

While the majority cites *United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999), Maj. Op. at 20a, the patent discussion in *Shumway* was dicta, and it did not pertain to preclusion of judicial review under the APA. *Shumway* involved a patent for mill sites, and the court mentioned that oil, oil shale, gas, and other minerals were subject to a federal leasing system under 30 U.S.C. § 193, and not to the Mining Law after 1920. 199 F.3d at 1100.

Finally, the majority cites *Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019 (9th Cir. 1976) (per curiam), but *Raypath* is neither a Mining Law case nor an APA case. Instead, it concerned the issuance of a patent of public lands to the state, and the statute and deed limited the use of the land to "public purposes." *Id.* at 1021 (citing 43 U.S.C. § 869).

More on point to the issue presented is *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980). The majority did not consider *Andrus*, where the Eighth Circuit decided the merits of a challenge to a mineral patent under the Mining Law without determining whether the Mining Law precluded judicial review. *Id.* at 1193. In *Andrus*, South Dakota had no ownership interest in the mining claim. South Dakota intervened in the agency proceeding, arguing that the Secretary must prepare an environmental impact statement before issuing a patent. The Interior Board of Land Appeals set aside the ALJ's decision on other grounds, but rejected South Dakota's argument. *Id.* at 1192. South Dakota then filed an original action in federal district court against the United States Department of Interior and the patent applicant, seeking an order compelling an environmental impact statement. The Eighth Circuit ruled on the merits, holding that BLM's patenting decisions do not require environmental impact statements, and without discussing whether the statute precluded judicial review. *Id.*

The majority relies upon the legislative and judicial history to conclude that Congress impliedly precluded judicial review: "Given an administrative review process for third-party issues, and the long judicial construction prior to the APA which did not permit judicial review of such claims, we would be hard pressed to conclude that the APA changed this." Maj. Op. at 21a-22a. Yet again, the majority fails to place the burden on the agency and fails to apply the strong presumption favoring judicial

review. Moreover, the majority overstates the holdings of the cases cited, and ignores the conflict between the text and structure of the Mining Law and the legislative history. The legislative history and judicial history do not establish that Congress intended to preclude judicial review.

B. Statutory scheme as a whole

Nor does the statutory scheme as a whole establish that Congress intended to preclude judicial review. The majority further concludes that the statutory scheme is "indicative of Congress' intent to preclude review to those with no adverse claim in the patented land," because of the "limited provision for the role of third parties" in the patent process. Maj. Op. at 25a, 26a. It is true that protesters did not have a private right of action like adverse parties, but that does not establish that their claims are precluded from judicial review.

Plaintiffs argue that, because Congress provided for third party participation in the administrative process, it did not intend to preclude judicial review. In rejecting this argument, the majority reasons that "Congress, by providing a right of action for adverse claimants, certainly knew how to provide one for unsuccessful protesters." Maj. Op. at 27a (internal citation omitted). In holding that the Mining Law precludes judicial review, the majority relies upon Congress' omission of a right of action in the Mining Law for third parties. For example, the majority states, "[d]espite these many revisions, Congress has not chosen to amend the 1872 Mining Law to provide Plaintiffs with a right of action." Maj. Op. at 25a.

But the test for implied preclusion of judicial review is not whether Congress provided an express right of action for the plaintiffs. "[A] plaintiff who lacks a private right of action under the underlying statute can bring suit under

the APA to enforce the statute," and he need "not rely upon an implied right of action under any other statute." *Hernandez-Avalos v. Immigration & Naturalization Serv.*, 50 F.3d 842, 846 (10th Cir. 1995). Section 1331 confers federal question jurisdiction "on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate." *Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Se. Kan. Cmty. Action Program, Inc. v. Lyng*, 967 F.2d 1452, 1455 n.4 (10th Cir. 1992); *Wilder v. Prokop*, 846 F.2d 613, 618 (10th Cir. 1988); *Labash v. U.S. Dep't of Army*, 668 F.2d 1153, 1156 (10th Cir. 1982). Thus, the protesters may challenge BLM's action under the APA, regardless of whether the Mining Law includes an express or implied private right of action, and we have federal question subject matter jurisdiction.

Nor does congressional silence demonstrate intent to preclude judicial review. Congress was silent about judicial review for protesters under the Mining Law, but silence is not determinative. "Mere silence in the statute should not be read as precluding judicial review under the APA." *Sierra Club v. Peterson*, 705 F.2d 1475, 1478-79 (9th Cir. 1983). Contrary to the majority's analysis, congressional silence does not support an inference that Congress intended to preclude judicial review.

Since the third-party protesters would not have had standing to file suit in federal court in the 1880s, it is rather surprising that Congress gave third-party protesters a participation role in the BLM proceeding. Yet the majority concludes that "[t]he limited role that the protesters play in the statutory scheme, coupled with congressional interest in finality and security of title, persuade us that the statutory scheme as a whole suggests an intent to preclude judicial review." Maj. Op. at 27a. Of course, the majority reaches this conclusion without

first requiring the agency to overcome the strong presumption of judicial review.

Tellingly, the majority seems to disregard the facts of *Block* itself. In *Block*, the Supreme Court held that Congress intended to preclude judicial review for a class of milk consumers because the relevant statute did not allow milk consumers to participate in the administrative process:

> Nowhere in the Act, however, is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process.

Block, 104 U.S. at 347. Because consumers were not allowed to participate at the administrative level, the Court concluded that Congress did not intend to rely on consumers to challenge agency actions. *Id.* at 346-47. From these facts, the Court found implied preclusion.

Unlike the milk consumers in *Block*, Congress expressly allowed protesters, as a class, to participate in the regulatory process under the Mining Law, and Congress relied upon third parties to ensure that patent applications complied with the statute by filing protests with the agency. *See* 30 U.S.C. § 29. Because the Mining Law allows protesters to participate in the administrative process, Congress did not intend to preclude judicial review of protesters as a class. The majority fails to discuss how this case conforms to *Block*.

C. Contemporaneous judicial construction and congressional acquiescence

The majority opinion does not rely upon contemporaneous judicial construction and congressional

acquiescence. Congressional intent to preclude review may be inferred from "contemporaneous judicial construction barring review and the congressional acquiescence in it." *Block*, 467 U.S. at 349. The majority correctly describes the burden of showing acquiescence. Maj. Op. at 24a. To show congressional acquiescence, a claimant "bears the burden of showing abundant evidence that Congress both contemplated and authorized the previous noncongressional interpretation in which it now acquiesces." *Catron County Bd. of Comm'rs v. U.S. Fish & Wildlife Servs.*, 75 F.3d 1429, 1438 (10th Cir. 1996) (internal quotations omitted). "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Id.* (internal quotation marks omitted). Given this burden, the majority recognizes that the agency falls short, concluding that the "consideration of the other *Block* factors sufficient to evidence an intent to preclude review." Maj. Op. at 25a.

For the reasons stated above, I would conclude that judicial review of the agency action is not precluded.

APPENDIX B
(District Court Opinion dated January 12, 2005)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Case No. 04-MK-0749 (PAC)

HIGH COUNTRY CITIZENS ALLIANCE; TOWN OF CRESTED BUTTE, COLORADO; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO, PLAINTIFFS,

v.

KATHLEEN CLARKE, in her official capacity as Director of the U.S. Bureau of Land Management; RON WENKER, in his official capacity as Colorado BLM Director; U.S. BUREAU OF LAND MANAGEMENT; GALE NORTON, in her official capacity as Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; PHELPS DODGE CORPORATION; MT. EMMONS MINING COMPANY, DEFENDANTS.

ORDER GRANTING THE DEFENDANTS' MOTIONS TO DISMISS AND DENYING THE MOTION FOR A PRELIMINARY INJUNCTION, AS MOOT

THIS MATTER comes before the Court on two motions to dismiss (**#12, #14**) filed by Defendants and Plaintiffs' motion for a preliminary injunction (**#6**). Having considered the motions, responses and replies, and the arguments of counsel (both written and oral), the Court finds and concludes as follows.

I. Nature of this Action

On April 2, 2004, the United States of America, pursuant to the 1872 Mining Law, through the Bureau of Land Management ("BLM") awarded mineral patents for 174 acres of federal land to Defendant Mt. Emmons Mining Company. The subject land is located in the Gunnison National Forest outside the town of Crested Butte, Colorado.

Plaintiffs seek to set aside the mineral patents even though they have no ownership interest in the subject land. Thus, they bring this action as unrelated third parties.[2]

II. Jurisdiction

For purposes of determining the pending motions, the Court exercises subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

III. Plaintiffs' Claims

Plaintiffs claim they have been harmed by the grant of mineral patents because they have lost their right to use the subject land for recreation and because the land should be protected for conservational, aesthetic and tourism purposes. The Complaint contains three claims.[3] In

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[2] For purposes of this Order, the Court uses the term "unrelated third parties" to refer to third parties who lack an ownership interest in land subject to a mineral patent.

[3] Defendants Clarke, Wenker, Norton, the BLM, and the United States Department of the Interior are referred to as "Federal Defendants." To the extent practicable, Defendants Mt. Emmons Mining Company and Phelps Dodge are referred to as "Private Defendants," although the Court notes that Plaintiffs have stated no claims against Defendant Phelps Dodge. The mineral patents were granted only to Mt Emmons Mining Company (referred to separately as "Mt. Emmons"), in which Phelps Dodge purportedly has an ownership interest. The Complaint

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Claim 1, Plaintiffs allege that the Federal Defendants violated the 1872 Mining Law,[4] applicable regulations, and the Administrative Procedures Act ("APA")[5] (1) by overruling their protests to Mt. Emmons' mineral patent application, (2) by awarding the patents, and (3) by conveying the land to Mt. Emmons. In Claim 2, they allege that the Federal Defendants violated the Freedom of Information Act ("FOIA")[6] and the APA by withholding documents related to the mineral patent application. In Claim 3, they allege that the Federal Defendants violated the Federal Land Policy and Management Act ("FLPMA')[7] and the APA[8] by failing to provide prompt notice of the rejection of the protests and to provide adequate statement of reasons for rejecting their protests.

Plaintiffs ask the Court: (1) to declare that the Federal Defendants have violated the 1872 Mining Law, the FOIA, FLPMA, and the APA; (2) to declare that the subject mining claims do not contain any valuable mineral deposits and therefore are not subject to patent under the 1872 Mining Law;[9] (3) to enjoin the BLM from conveying the patents or land title to Mt. Emmons; (4) or if such conveyance has already occurred, to suspend, rescind or

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alleges that Mt. Emmons a wholly owned subsidiary of Cyprus Climax Metals Company, which is a wholly owned subsidiary of Phelps Dodge.

[4] 30 U.S.C. §§ 21-47.

[5] 5 U.S.C. §§ 701-706.

[6] 5 U.S.C. § 552.

[7] Particularly, 43 U.S.C. § 1701(a)(5).

[8] Particularly, 5 U.S.C. §§ 555(e).

[9] For this request, the Plaintiffs rely particularly upon 30 U.S.C. §§ 23 and 29.

void the patents and prohibit the conveyance of the land; and (5) to order the BLM to release all documents previously requested under the FOIA.

Under Fed. R. Civ. P. 12(b)(1), the Federal Defendants move to dismiss Claims 1 and 3. The Private Defendants move to dismiss all three claims under Fed. R. Civ. P. 12(b)(6). Plaintiffs concede that Claim 2 cannot be asserted against the Private Defendants, thus, Claim 2 is dismissed to the Private Defendants.[10]

IV. Issue Presented

The fundamental issue presented is whether Plaintiffs, as third parties without an ownership interest in the subject land, can challenge the issuance of mineral patents conveyed to Mt. Emmons through this action.

V. Standards of Review

The Federal Defendants' motion is brought pursuant to Fed. R. Civ. P. 12(b)(1). Under this rule, a party may to move to dismiss claims for lack of subject matter jurisdiction. Rule 12(b)(1) motions generally take one of two forms. *See Stuart v. Colorado Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001). The moving party may either facially attack subject matter jurisdiction based on the complaint's allegations, or it may go beyond the allegations in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests. *See Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003). Here, the Federal Defendants challenge the Court's subject matter jurisdiction over Claims 1 and 3 based on the Complaint.

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[10] Plaintiffs and the Federal Defendants have filed cross-motions for summary judgment on Claim 2. The Court defers ruling on those motions.

The Private Defendants' motion is brought pursuant to Fed. R. Civ. P. 12(b)(6). Under this rule, a party may to [sic] move to dismiss a claim on the basis that it fails to state any claim upon which relief may be granted. There is a strong presumption against the dismissal of claims under Rule 12(b)(6). *See Cottrell, Ltd. v. Biotrol Intern., Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999). The Court accepts all well-pleaded allegations in the complaint as true and construes them in the light most favorable to Plaintiffs. *See Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). Only if Plaintiffs can allege or prove no set of facts in support of their claims is dismissal appropriate. *See Jojola v. Chavez*, 55 F.3d 488, 490 (10th Cir. 1995).

VI. Analysis

Although the motions to dismiss are brought under different subsections of Rule 12(b) and with different labels, both assert essentially the same argument for dismissal of Claims 1 and 3 – that Plaintiffs cannot challenge the validity of the mineral patents issued to Mt. Emmons in this action. The Federal Defendants argue that these claims are barred by the doctrine of sovereign immunity; the Private Defendants argue that there is no claim which Plaintiff's can bring. Whether viewed through a jurisdictional or pleading lens, there is a single fundamental question: Can third parties who lack an ownership interest in the land subject to a mineral patent challenge the issuance or validity of the patent by judicial action? In the absence of recent binding precedent, this Court concludes that the answer is no.

For a private cause of action to exist under federal law, there must be a federal statute authorizing the claim. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). A federal statute creates a private cause of action if Congress, expressly or by implication, intended to create one. *See Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1267 (10th Cir. 2004). However, without such intent, "a cause of

action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *See Alexander*, 532 U.S. at 286-87.

The doctrine of sovereign immunity reaches one step further. Although a statute may create a private cause of action, such claims cannot be asserted against the federal government unless the government consents. Absent either consent in the particular action or a congressional waiver of immunity, the United States, its agencies, and its officers acting in their official capacity generally are sovereign and immune from suit. *See Boehme v. U.S. Postal Service*, 343 F.3d 1260, 1263 (10th Cir. 2003), *Wyoming v United States*, 279 F.3d 1214, 1225 (10th Cir. 2002). In this action, the Federal Defendants do not waive immunity, thus any waiver must be expressly stated in a statute – it cannot be implied. *See Villescas v. Abraham*, 311 F.3d 1253, 1256-57 (10th Cir. 2002). Waivers are construed strictly and ambiguities are resolved in favor of immunity. *See id.* General jurisdictional statutes such 28 U.S.C. §§ 1331, 1346 and 1361, and the declaratory judgment statute, 28 U.S.C. § 2201 – all of which are invoked by Plaintiffs in their Complaint as conferring subject matter jurisdiction upon this Court – do not waive sovereignty. *See Wyoming*, 279 F.3d at 1225.

As to both the existence of a right of action and the waiver of sovereign immunity, Plaintiffs carry the burden. *See Fostvedt v. United States*, 978 F.2d 1201, 1203 (10th Cir. 1992). They premise Claim 1 on the APA and the 1872 Mining Law, and Claim 3 on the APA and FLPMA. For the reasons set forth below, this Court concludes that such statutes do not authorize Plaintiffs to bring a claim challenging mineral patents issued pursuant to the 1872 Mining Law.

A. Claim 1

1. The APA

Plaintiffs assert that the APA authorizes their challenge to the subject mineral patents. They rely on 5 U.S.C. § 702, which states in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.... Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

This section allows for judicial review of federal agency action, in particular circumstances.[11] Thus, this section of the APA creates a limited waiver of sovereign immunity. *See Neighbors for Rational Development, Inc. v. Gail Norton*, 379 F.3d 956, 961 (10th Cir. 2004). However, this section also contains limitations on the waiver. The question becomes whether either of the limitations are applicable here.

The two exceptions to the waiver of sovereign immunity under § 702 are: (1) when a statute specifically precludes judicial review of agency action, or (2) when the subject action is committed to the agency's discretion[12] by

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[11] This provision can only authorize a challenge against the Federal Defendants.

[12] This means that the agency acts pursuant to a statute that provides no meaningful standard against which to judge its exercise of discretion. *See Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004).

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law. 5 U.S.C. § 701(a); *see also Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 641 (10th Cir. 1990); *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984); *City of Albuquerque v. U.S. Dept. of the Interior*, 379 F.3d 901, 907 (10th Cir. 2004). In this matter, the Court focuses upon the first exception.

To determine whether a statute precludes judicial review, a court considers the express language of the statute, its overall statutory scheme and objectives, and its legislative history. *See Block*, 467 U.S. at 345. If the statute "expressly or impliedly" prohibits a claim, then no action can be brought against the government for review of the federal agency action. *See* 5 U.S.C. § 702; *see, e.g., Fostvedt, supra*. Thus, if the 1872 Mining Law precludes Plaintiffs' claims against the Federal Defendants, then the Federal Defendants are entitled to sovereign immunity.

This inquiry embodies the fundamental question of whether the 1872 Mining Law creates a private cause of action for unrelated third parties. The Court therefore looks to the 1872 Mining Law to determine whether it authorizes a private cause of action against either the Federal or Private Defendants.

2. The 1872 Mining Law

Enacted more than 132 years ago, the 1872 Mining Law established a procedure for allowing citizens to purchase land owned by the United States for mining purposes. 30 U.S.C. §§ 22 & 26. The process for obtaining a mineral patent pursuant to the 1872 Mining Law is relatively simple and streamlined. A citizen applies for a mineral patent – which conveys title to the land – in a "proper land office." *See* 30 U.S.C. § 29. The application requires only a

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Exemption from judicial review on this basis is rare. *See id.* at 1228. It is not asserted here.

minimal showing; notice of it is posted on the subject land. *See id.* If no citizen with a competing ownership interest the land files an adverse claim,[13] then the applicant is entitled to a mineral patent unless the application fails to comply with the provisions in the 1872 Mining Law. *See id.* If there is an adverse claim, the adverse claimant may commence court action to determine the right of possession, following which one or more mineral patents "shall issue" to the applicant and/or adverse claimant. *See* 30 U.S.C. § 30.

The 1872 Mining Law does not contain an express waiver of sovereign immunity for judicial review of the grant of a mineral patent by an unrelated third party. As a consequence, before enactment of the APA in 1947, no claims under the 1872 Mining Law were assertable against the United States. *See Villescas*, 311 F.3d at 1256-57; *Neighbors for Rational Development, Inc.*, 379 F.3d at 961. Since the enactment of the APA, the question of whether unrelated third parties can challenge the validity of mineral patents has not been addressed. Therefore, consistent with the general approach for assessing the impact of the APA upon sovereign immunity, the Court examines the express language of the 1872 Mining Law, its overall statutory scheme and objectives, and its legislative history to determine whether it expressly or impliedly prohibits such a claim. *See Block*, 467 U.S. at 345.

The only language in the 1872 Mining Law addressing the role of unrelated third parties in the patenting process is found in 30 U.S.C. § 29, which provides in relevant part:

> If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the

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[13] Plaintiffs agree that they are not adverse claimants.

> proper officer of $5 per acre, and that no adverse claim exists; **and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43.** (Emphasis added).

The 1872 Mining Law does not define the term "objection," nor does it specify when such objection may be made. However, the Colorado Circuit Court in 1884 characterized the right to "object" as a right to "protest," and that such protest is assertable only to the land department:

> Such a protest can be made only before the land department, and, if there rejected, the protestant has no further standing to be heard anywhere. The protest cannot be made the basis of any litigation in the courts, for the courts are only open to those who have rights to assert; they sit for the determination of controversies. They do not, at the instance of strangers, review the regularity of proceedings between parties who are competent to determine such regularity, and who do not themselves invite any judicial determination.

See Wight v. Dubois, 21 F. 693, 696 (C.C. Colo. 1884).

This interpretation is consistent with a current implementing regulation, 43 C.F.R. § 3872.1, which characterizes an "objection" as a "protest" and limits it to the patenting process. *See also* Rocky Mountain Mineral Law Foundation, *American Law of Mining*, § 33.02 (2d ed.) ("a protest may be filed at any time before patent is issued"). Thus, fairly read, the express language of the 1872 Mining Law does not grant third parties who lack an ownership interest in the subject land a right to judicial

review – only a right to assert a protest while a patent application is under consideration the BLM.[14]

This interpretation is consistent with the legislative purpose of the 1872 Mining Law. The law was created to establish a simple and expedited procedure for issuance of mineral patents, to ensure notice to adverse claimants, and to resolve disputes among competing claimants. Although the legislative history of the 1872 Mining Law is scant, it is apparent that it was enacted "to promote the development of the mining resources of the United States." CONG. GLOBE, 42nd Cong., 2nd Sess. 532-35 (1872); *see also* Carl Mayer, *The 1872 Mining Law: Historical Origins of the Discovery Rule*, 53 U. CHI. L. REV. 624, 636 (Spring 1986). Its goals were to promote the extraction of mineral resources from the land in the developing western United States, to increase the wealth of the United States Treasury, and to enable miners to establish permanent homes and build communities. CONG. GLOBE, 42nd Cong., 2nd Sess. 534 (1872).[15]

The expedited process and the limited role of unrelated third parties in the process have been consistently recognized by the courts. Within a decade after the 1872 Mining Law's enactment, the Supreme Court concluded

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[14] In this respect, the plight of the unrelated third party is different from that of the adverse claimant. The 1872 Mining Law expressly creates a private cause of action for an adverse claimant to enforce a claimed ownership interest in the land subject to a mineral patent application. *See* 30 U.S.C. § 30. An adverse claimant is also deemed to be a "party in interest" with a right to administrative appeal. 43 C.F.R. § 3872.1(a).

[15] A predecessor mining law enacted in 1866 had similar purposes. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3225-3227 (1866). The 1866 law was supplemented in 1870. See CONG. GLOBE, 41st Cong,, 2d Sess. 4402-04 (1870).

that once issued, mineral patents are "unassailable," and third parties cannot collaterally challenge their issuance except upon grounds that the government

> had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.[16]

See Smelting Co. v. Kemp, 104 U.S. 636, 640-47 (1881).

The decision in *Smelting Co.* has not been overruled during the 124 years since its issuance. Instead, subsequent decisions have relied upon it for the same or similar proposition. More than 30 years after *Smelting Co.*, the Supreme Court restated the principle that collateral attacks to federal patents are not allowed. *See Northern Pac. Ry. Co. v. McComas*, 250 U.S. 387, 393 (1919). Some 60 years later, the Ninth Circuit relied upon *Smelting Co.* for the proposition that "it is well established that the validity of a deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee[.]" *See Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1976). More recently, the Ninth Circuit observed that in accordance with *Smelting Co.*, "A patent does not merely pass title, like a deed, but operates as an official declaration of title which is, with limited exceptions, unassailable and not

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[16] In other words, there can be no collateral attack regarding the government's determination that the land is suitable for mining.

rebuttable." *See United States v. Shumway*, 199 F.3d 1093, 1096 (9th Cir. 1999).

Legal commentators also agree that mineral patents issued under the 1872 Mining Law are unassailable after issuance except as provided by *Smelting Co.* For example, a leading treatise states:

> [T]he issuance of a mineral patent creates a presumption that all requirements of law were met prior to its issuance. Unless the Interior Department had no jurisdiction to issue a patent, this presumption is conclusive, except in a suit in equity brought by the United States to cancel or modify a patent. Assuming the Interior Department had jurisdiction to issue a patent, it is not subject to collateral attack in an action at law nor may it be canceled in equity, even for fraud or mistake, in a suit brought by a private person.

Rocky Mountain Mineral Law Foundation, *American Law of Mining*, § 54.05[2] (2d Ed.).

General recognition of the limited role that unrelated third parties play under the 1872 Mining Law is also, somewhat paradoxically, demonstrated by congressional efforts to reform it. Over 30 years ago, a prominent commentator observed that "[r]evising the Mining Law will come about only when someone in Congress decides the time is right to make the effort that will be necessary to change a law that has been essentially the same for 100 years." Perry R. Hagenstein, *Changing an Anachronism: Congress and the General Mining Law of 1872*, 13 Nat. Resources J. 480, 493 (1973). More recently, others have called for its repeal, describing it as "a relic of an earlier age." *See* Michael Braunstein, *Natural Environments and Natural Resources: An Economic Analysis and New Interpretation of the General Mining Law*, 32 U.C.L.A. L. Rev. 1133, 1134-35 (Aug. 1985). On several occasions, Congress has considered reforming or repealing the 1872 Mining Law, referring to it as "archaic" and not reflective

of current environmental policy or public opinion. *See, e.g.* 150 CONG. REC. E831-02 (2004); 149 CONG. REC. E977-02 (2003), 147 CONG. REC. E373-02 (2001), 146 CONG. REC. E986-01 (2000); 145 CONG. REC. E85-03 (1999), 141 CONG. REC.. S3521-02 (1995). However, Congress has not attained consensus to reform the 1872 Mining Law.

The Court recognizes that in the 133 years that have passed since enactment of the 1872 Mining Law, social issues and concerns have changed. Rather than desiring the extraction of mineral resources from public lands and the social expansion in the western United States, citizens are now concerned abut environmental, recreational and aesthetic issues. This Court does not doubt the importance of such concerns. However, the structure of the 1872 Mining Law, its express terms, its legislative history and interpretive case law do not even remotely authorize unrelated third parties to challenge issuance of a mineral patent in a subsequent judicial action. The antiquated, but streamlined, patent process created by the 1872 Mining Law would be defeated by such addition.

This Court cannot amend the law by judicial fiat. No matter how desirable or necessary, as a policy matter, a private cause of action for unrelated third parties might be, the Court cannot create one. *See Alexander*, 532 U.S. at 286-87. Only Congress can modernize the 1872 Mining Law to expand the role of unrelated third parties. In other contexts, Congress has created mechanisms for citizen suits when environmental issues are at stake. *See, e.g.*, The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659; The Safe Drinking Water Act, 42 U.S.C. § 300j-8; The Clean Water Act, 33 U.S.C. § 1365. If Congress believes such concern warrants judicial review of mineral patent grants, then it can create third party remedies.

Because the 1872 Mining Law implicitly precludes unrelated third parties from challenging mineral patents by judicial action, the APA does not constitute a waiver of

sovereign immunity for purposes of this action. Thus, Claim 1 against the Federal Defendants must be dismissed. Similarly, because the 1872 Mining Law creates no private cause of action, Claim 1 against the Private Defendants must also dismissed. As a consequence, Plaintiffs' motion for a preliminary injunction, directed at Claim 1, becomes moot and is denied.

B. Claim 3

1. The APA

In Claim 3, Plaintiffs assert a substantive claim under the APA, 5 U.S.C. § 555(e), which provides:

> (e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Plaintiffs challenge the timing and sufficiency of the notice given by the Federal Defendants regarding the rejection of their protests to the mineral patent application.

This is not a challenge to the notice given to Plaintiffs during the patent process, but rather is a challenge to the notice given to them of the BLM's decision to issue the mineral patents. As such, it is an indirect challenge to the patents, themselves. Assuming a notice defect, there is no available remedy. As explained earlier, the 1872 Mining Law creates no private cause of action for unrelated third parties to challenge the issuance of a mineral patent. Third parties have no right of appeal from a decision to issue a mineral patent.

Here, Plaintiffs do not complain of inadequate notice during the patent process,[17] but only of the final decision to issue the patents. Without a right to appeal or to challenge the patent determination, there is no remedy for delayed or inadequate notice of such decision.

2. FLPMA

Plaintiffs also assert a claim under FLPMA. They allege that the Federal Defendants deprived them of an opportunity to review the Private Defendants' complete patent application, a mineral report, and other documents in violation of FLPMA, 43 U.S.C. § 1701(a)(5). However, this section expresses only legislative intent and does not create a private cause of action. Section 1701(a)(5) states in relevant part:

> (a) The Congress declares that it is the policy of the United States that– . . .
>
> > (5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking; . . . .

Congress' intent that § 1701(a)(5) be precatory rather than self-effecting is further apparent in the language of § 1701(b), which provides:

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[17] This Court does not address whether inadequate notice during the patent process might give rise to judicial review under the APA.

> (b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted **by this Act or by subsequent legislation** and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law. (Emphasis added).

Reading §§ 1701(a)(5) and (b) together, it clear that Congress' goal was to assure third party participation as otherwise provided by FLPMA or another subsequently enacted statute. FLPMA does not provide that third party participation is mandated with respect to mineral patents issued under the 1872 Mining Law. The 1872 Mining Law has not been amended to incorporate this objective. Plaintiffs have identified no other implementing statute which would support this claim. Thus, Claim 3 is dismissed in its entirety.

IT IS THEREFORE ORDERED that:

(1) The Defendants' Motions to Dismiss (**#12, #14**) are **GRANTED**.

(2) All claims against the Private Defendants are **DISMISSED**. The case caption shall be amended to delete Defendants Mt. Emmons Mining Company and Phelps Dodge Corporation.

(3) Claims 1 and 3 against Defendants Clarke, Wenker, BLM, Norton, and United States Department of the Interior are **DISMISSED**. The sole claim remaining against the Federal Defendants is Claim 2.

(4) Plaintiffs' Motion for Preliminary Injunction (**#6**) is **DENIED**, as moot.

Dated this 12th day of January, 2005.

BY THE COURT:
s/ Marcia S. Krieger
United States District Judge

APPENDIX C
(Order denying rehearing dated October 27, 2006)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 05-1085

HIGH COUNTRY CITIZENS ALLIANCE; TOWN OF CRESTED BUTTE, COLORADO; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO, PLAINTIFFS-APPELLANTS

v.

KATHLEEN CLARKE, in her official capacity as Director of the U.S. Bureau of Land Management; RON WENKER, in his official capacity as Colorado BLM Director; UNITED STATES BUREAU OF LAND MANAGEMENT; GALE NORTON, in her official capacity as Secretary of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR; PHELPS DODGE CORPORATION; MT. EMMONS MINING COMPANY, DEFENDANTS-APPELLEES

ORDER

Filed October 27, 2006

Before: KELLY, BRISCOE, Circuit Judges and JOHNSON,* District Judge.

Appellants petition for panel rehearing is denied. Judge Briscoe would grant panel rehearing.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

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* The Honorable William P. Johnson, District Judge, United States District Court for the District of New Mexico, sitting by designation.